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Volume 13

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 28

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vs.

THE CEMENT INSTITUTE, et al.

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vs.

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ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 20, 1947
CERTIORARI GRANTED MARCH 10, 1947

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31208 Washington, D. C.,
January 24, 1940.

31209 Mr. Paulson: Well, we would rather like to know whether Mr. Brick still feels that it is necessary to go into the location of mills; but we do not necessarily care to have a long discussion of it.

Mr. Brick: Oh, yes, of course, we do. I might say that for all the reasons heretofore stated, and probably several others—

Trial Examiner Norwood: Well, what I have to say is this: I haven't fully—I haven't had time to study that statement fully, as on account of the deep snow I
31210 was not able to get here at the usual time; but, for the time being, I am going to exclude all evidence about the location of your plants except as it might in some way be connected with your pricing method, and not as it might be connected with any alleged results there. In other words, there is no factual issue as to the economic location of plants, and I shall not receive any evidence thereon, and I think that—

Mr. Brick (interposing): Well, in a way—

Trial Examiner Norwood: —from the reading of Mr. Wooden's statement there, I think he makes all necessary admissions to meet that.

Mr. Brick: I see.

Trial Examiner Norwood: And any denial of that would not deprive you of anything substantial.

31212 Trial Examiner Norwood: The substance of
31213 that statement is that the effect is so and so and so. Now, if you want to show that the effect is not so, you may do so; but to make a factual issue as to the particular location of this plant, that it is not operating on these high prices—

Mr. Brick (interposing): Well, now—

Trial Examiner Norwood: —not operating under an economic conditions—

Mr. Brick: Yes.

Trial Examiner Norwood: —by reason of the high prices,—I think that that is not—

Mr. Brick: I understand that view.

Trial Examiner Norwood: —that that is not an issue.

Mr. Brick: But I do not think it should prevail.

31217 Mr. Brick: Well, that may be Your Honor's view but it is not our position.

Trial Examiner Norwood: Wait a minute. Please let me have a word.

I am not making these decisions on what I think or what you think that the Counsel for the Commission is going to argue or what he says he is going to argue. Now, the question is, Does this evidence apply to this issue here, this statement, this charge that one of the effects of the grievance, alleged grievance, alleged combination, and so on, would be to permit uneconomically located mills to operate by reason of this enhancement in price?

Now, there is no issue of fact there. It is a matter of economic theory, it seems to me, and any issues raised there, I think, is an irrelevant issue, and by excluding this evidence after you make the proffer it gives you all of the advantage you need.

31218 Now, if the Commission decides I am wrong it can overrule me and remand the case for the taking of evidence on that. Well, I do not think that they are going to do that and we are wasting too much time on these inconsequential details, and I am not going to receive any more evidence, particular evidence as to particular location of particular plants, and especially as if in this case I see that it would not apply in any view.

Mr. MacIntyre: Your Honor please—

Trial Examiner Norwood: Well, let's see if he has finished.

Mr. Brick: No, I have not concluded, Your Honor. Thank you.

Trial Examiner Norwood: I think that that should end the matter. We are not deciding this.

Mr. Brick: I think it is important.

Trial Examiner Norwood: If you want to present a further written statement there, I will receive it in the same way I did Mr. Wooden's, but I do not want to hear any more on this from either side.

Mr. Brick: Let me say this in passing, Your Honor: My only purpose in bringing these things to your attention is so that you may be fully advised of our position. We want to make full disclosures and be as frank as possible with regard to the purposes for which we offer the
31219 evidence, and to the extent we are cut off from doing that, to that extent Your Honor can't be advised.

Trial Examiner Norwood: I think I am fully advised and I will take the responsibility.

Now, if you will just direct your evidence to the issues in the case hereafter and just stay right on them.

Mr. Brick: Well, as I understand, then, the state of the record, the general matters which Your Honor has mentioned as being not a proper subject of defense testimony has been excluded and that covers the entire line?

Trial Examiner Norwood: Covers what? Yes.

Mr. Brick: On that basis I offer to prove that if permitting so to do through the witness, Mr. Ackerman, we would show that the survey made under the direction and supervision of Professor Benjamin L. Miller, of Lehigh University, in 1928, with respect to the availability of stone from the quarry of the Lawrence Company, located at Siegfried, it developed that on that property there were 30,000,000 tons of fair stone; that operating at full capacity that plant would not produce more than 2,800,000 barrels in any one year; that on the basis of using one ton for each 3½ barrels manufactured—that is, barrels of cement—the quarry would last the purposes of the mill for a period of between 45 and 50 years; that in addition to that quarry, the mill has close by another property 31220 which was also surveyed, and analyzed by the same Professor Miller, and that his result concerning that survey and analysis were that 17,900,000 tons of fair rock were also available for the purposes of the Siegfried mill, and that as to the Thomaston plant, it is located at a point close by the quarry, and that the mill is situated immediately overlooking the quarry, and adjacent to it; that core drillings were made in 1925 with respect to that quarry, and that on the basis of the drillings sufficient suitable limestone to manufacture cement was found to be sufficient to manufacture 60,000,000 barrels of cement; that that source of supply from the standpoint of limestone and essential raw materials would permit the mill to operate for a period of over fifty years.

That completes, if Your Honor please, my offer with regard to the quarry and availability of stone.

Trial Examiner Norwood: Counsel has his exception.

31221 JAMES H. ACKERMAN thereupon resumed the stand and testified further as follows:

Direct Examination by Mr. Brick (Continued).

Q. When we concluded last evening we were referring to Commission's Exhibit 969-7-C. I would like to bring that to your attention (handing document to the witness). That represents, does it not, the response your company made to the Clark-Burns questionnaire?

A. It does.

31222 Q. Now, you will see there a reference to the Lawrence company having quoted prices on a dual base from its Siegfried mill during the period beginning September 11, 1931, and ending May 31, 1932. Do you note that?

A. Yes, sir.

Q. Do you recall that you did quote such prices during that period?

A. I do.

Q. Did you inaugurate those prices in New Jersey?

A. No, sir; we did not. We picked up quotations, sent out by Lehigh, and an analysis of the quotations seemed to indicate that the lower base referred only to the State of New Jersey; in other words, there were no lower prices in the field extending beyond the State of New Jersey.

Q. Now, how did you know that that particular base which you followed in arriving at prices applied only to New Jersey?

A. Well, it was very simple to calculate the new delivered prices to determine that; in other words, we checked on many points in New Jersey and surrounding States and by simple arithmetic, subtracting our freight from the Valley to those destinations, a constant base was reflected for New Jersey, which was 10 cents less than the base reflected at other destinations outside of the State.

Q. Is there any railroad on the border line of

31223 New Jersey which is also the border in the application of one of the bases?

A. Well, not that I know of, if I understand your question correctly.

Q. But you did pick up quotations in the field which reflected one base with respect to some territory, all of

which was on one side of the State line, and other quotations which reflected a different base figure, all picked up and applying on the other side of the State line?

A. Yes, sir.

Q. Now, Mr. Ackerman, how do you determine the price at which you sell your cement at any particular destination?

A. We quote a price which we believe to be the market price at the destination in question. Sometimes that price will reflect a base at our own plant; other times it may reflect a base at a competitor's plant. Sometimes no base is reflected. We quote a price depending on the conditions in the market, which conditions affect the market.

Q. You refer to the term "market price,"—what do you mean by that term?

A. That's the highest price which we can obtain in the market.

31224 Q. Now, with respect to those prices which are not originally quoted by your company, and which subsequently become what you might call the market price, how do you get your information concerning the figures of such a price?

A. From our salesmen or from our customers.

31225 Q. Do contractors ever give you information concerning new prices in a market, or changes in prices?

A. Yes, sir; they do; that's another source of information.

Q. Now, under what circumstances do they do it? What is their interest in the situation which would cause them to give you that information?

31226 Q. Have you had personal contact with contractors on any occasions when they were giving you information concerning changes in prices received
31227 by them from competitors of your company?

A. Yes, sir; I have.

Q. Well, tell us, factually, just what the general situation is as to what they tell you and as to what you might tell them.

A. I know many of the contractors with whom we do business personally; naturally, I try and know them all. The contractors' business is to build roads, buildings, or bridges—

Trial Examiner Norwood: Now, just tell us any con-

siderations that would make it to the advantage of the contractor to repeat this price to you, and answer that just as briefly as you can.

A. In building any of these construction jobs that I have described, the contractor must submit a figure. In order to arrive at his figure he comes to us and asks us to quote him a price for future delivery. Many times contractors have submitted bids, they are in the hands of the owner, and the owner is deciding to whom he shall award his contract, before the contractor has actually protected himself on price. Therefore, at the time of the change in the market the contractor is exceedingly anxious to know whether he will be protected by us on the basis of the price he used, which was in effect at the time he used it in submitting his bid on the operation in question.

By Mr. Brick:

31228 Q. Now, have your competitors, Mr. Ackerman, ever provided you with advance information of price changes initiated by any of them?

A. No, sir.

Q. Now, in your 19 years in the cement business as a salesman, have you ever known of a price change, either upward or downward, where information of the change was not relayed immediately by your sales force, or your customers, to your general sales headquarters, and I refer to quotations sent out by competitors to their trade?

A. I have never known of an instance where we did not pick up the information almost as soon as it reached the field.

Q. In other words, that is a condition in the trade, I take it, without exception?

A. Without exception.

Q. Now, then, the last time you testified as a Government witness you stated that your used base figures in the calculation of some of your prices. To what extent, Mr. Ackerman, do you use basing points in the computation of your prices, generally?

A. Well, today, some of our prices reflect our base at Thomaston, and—

Trial Examiner Norwood: Now, he has told us that. Now, you have told us that, that some prices affect your base, and some prices affect the other man's base,

31229 and some prices affect no base.

Is there anything further you want to bring out along that line?

Mr. Brick: Why, the point of my question was, Your Honor, to know to what extent that was done. That is, I would like to find out, explore the situation; find out whether there are other situations. I think that if the Reporter would read my question that it would be clear.

31230 A. —and other prices reflect our base at Siegfried.

By Mr. Brick:

Q. Have you finished your answer?

A. Yes.

Q. Do you quote any prices, Mr. Ackerman, which do not reflect either a base of your company or the base of a competitor?

A. Yes, sir.

Q. And will you describe the territories where such prices are effective?

A. The Greater New York area through Westchester and Long Island disclose prices which do not reflect a base. There are other isolated spots, one comes to mind, Watupa, Mass., which is a suburb of Fall River, Mass. I believe Brewer, Me., which is across the river from Bangor, Me., would not reflect any base. It is done to make the two markets competitive; that is to say, to make the dealers in the two markets competitive, one with another. They both serve—or, rather, they all serve both markets. One minute the Bangor, Me., man might be doing business in Brewer, and vice versa.

There are probably other similar cases that do not come to my mind at the moment.

Q. Well, now, is that typical of a general situa-
31231 tion which exists where two close-by markets have different freight rates from mills?

A. Yes, sir; that is typical.

Q. And does that occur around mills, themselves, or is that a condition which you would only find at a distance from a mill?

A. No, I do not think you could limit it to the territory around mills. You might find it around mills, you might find it at great distances. In some instances it is brought about by the freight rate structure. The railroad in a particular case I mentioned to you at Bangor and Brewer

has to go a good many miles in order to go from Bangor to Brewer, but there is—the stream is not much wider than in this room, there is plenty of bridges to cross, but the railroads work out their freight schedule on a mileage basis.

Q. Did your company, or some other company, originally quote the prices which has become the market price at Bangor? In other words, did you follow that price or did you lead with it?

A. I think we followed Bangor but we established Brewer.

Trial Examiner Norwood: Well, is the greater portion of your cement sold on prices that figure to a basing point?

The Witness: Right now; yes, sir. Other years I would say it was the other way around. Again, that
31232 depends on the conditions in the market, Your Honor.

By Mr. Brick:

Q. Now, you have stated to His Honor the situation existing presently. What have been other situations where the conditions were different?

A. Well, there have been times when most of our consuming area has not reflected any base. At one time Boston and a fifty-mile radius, and New York and a fifty-mile radius, did not reflect any constant base figure.

Q. Now, to what extent is your general business in the nature of repeat orders?

A. The great majority of it, the great percentage of it; certainly more than 80 percent.

Trial Examiner Norwood: That is from dealers?

The Witness: Dealers or contractors, block manufacturers.

Trial Examiner Norwood: Most of it from dealers?

The Witness: Dealers and block manufacturers and concrete products manufacturers, and the like: people with permanently established places of business, sir.

By Mr. Brick:

Q. And is it usual or unusual for you to pick up new customers?

A. Well, if I have a salesman that cannot turn
31233 in new accounts each year I would get rid of him. We add new customers every year.

Q. Now, from the standpoint of degree which is of

some significance, possibly, about how many new accounts might you establish in the course of a year?

A. In the year 1939 we established over a hundred new accounts. Those figures were placed on my desk last week.

Q. And during that year did you lose some accounts?

A. Well, that is difficult to say. Some people only buy one car of cement every two years; that is, to say, they only buy one car of cement from us every two years. They are small, and it is difficult to determine whether you have lost such an account simply because you do not do business with them that year. There may have been—no doubt there were—some accounts that we lost.

Q. Now, after you advise the customer of your price at his destination, as you have described in sending out quotations, does your sales department ever have occasion to discuss the prices with the customer thereafter?

A. Oh, occasionally—not—

Q. That is, up to the point of another change?

A. Occasionally; not as a general proposition. The customer—

Trial Examiner Norwood: I think you have answered that.

31235 By Mr. Brick:

Q. Now, referring to Commission's Exhibit 969-7-B, will you look at your answer to question 22-B. It appears from this exhibit that your company instituted two price increases. I think the first is November 22, 1929. There was another one July, 1933. Do you notice the reference to that in that paper (handing exhibit to the witness)?

A. Yes, sir.

Q. Now, what were the circumstances which led you to increase your prices in November, 1929?

31236 A. Well, in August, as I recall it, in '29, the Alpha Company had reduced prices all over our territory an amount which reflected a 30-cent reduction in their mill base. In November—

31238 A. In November—or make that on November, please. On November 22 we raised our prices a flat 30 cents at every point at which we sought business in an effort to recover some of the losses which these new prices brought to us. On the basis of 30 cents a barrel and 2,000,

000 barrels annual sales, it meant a loss to our company of $600,000 annually.

By Mr. Brick:

Q. To what extent, if any, did your competitors follow your quotations covering those advances?

Mr. Paulson: May I have an objection to the line of questions? I say this is too remote.

Trial Examiner Norwood: Yes.

Mr. Paulson: With emphasis I say it is too remote.

Trial Examiner Norwood: Go ahead. Answer the question.

The Witness: Please read the question again.

Trial Examiner Norwood: Read it.

(Last question read by Reporter.)

A. Most of the new prices which we named were met and followed. Some of them, however, were not followed the full 30 cents.

By Mr. Brick:

Q. And then what did you do?

A. We issued quotations at those points where our 30-cent advance was not followed equal to the price
31239 which was filed by our competitors.

Q. Now, the exhibit to which I made reference also included a statement to the effect that you had another advance, which I believe was in 1933; is that correct?

A. Yes, sir; it was, on July 11, 1933.

Q. What were the circumstances which gave rise to that advance?

31241 A. Costs were moving at that time. The President had asked industry to increase wages and shorten hours, and in order to cooperate, which meant increased costs, we advanced our prices.

By Mr. Brick:

Q. Now, in connection with that advance, Mr. Ackerman, how did you make your announcements to your customers?

A. We sent out a circular to all our trade, explaining the reasons at the time we sent out new prices.

Q. At that time was your company operating at a loss or a profit?

A. It had been operating at a loss for several years.

31255 Q. Mr. Ackerman, at the time you initiated the advance of 30 cents in November, 1929, I think you stated that you issued new quotations to each of your customers raising the then current price 30 cents.

Now, I want to ask you to what extent you considered any base figures which might have appeared through market conditions to have been in effect at that time?

A. We had no consideration whatsoever for any base figures at the time we issued the prices to which you have referred.

Q. Now, you also stated that one of your competitors a few months prior to the time that you made that advance reduced prices generally. Now, were all of those reductions the same amount?

A. No, sir; they were not.

Q. So that when you made your advance of 30 cents in some cases that 30 cents might have been more or less than the amount of the reductions at various points in your sales territory; is that correct?

A. It was more in all cases; I don't think it was less in any case.

31256 Q. When you say "more," do you mean that your advance was at least as much as the maximum reductions which had been effected by your competitors before November, 1929?

A. Yes, sir.

31261 Q. Yesterday, Mr. Ackerman, you mentioned a policy of your company of having a five-day period for the retroactive effect of price declines.

Now, how long have you followed the practice of making a price reduction retroactive for such a five-day period?

A. I think since the N. R. A.

Q. Had you done it—

A. We had a—that is to say, for the five day period. Prior to that time, we had sort of a hit-or-miss policy. In other words, when we would reduce a price many of our customers had just received a shipment of cement or may have a shipment of cement en route, and they would immediately come to us and say, "Here, we cannot re-sell this on the basis of the price which was in effect when we bought it. Now, adjust this thing. Put us back in a position to market this at a profit."

And at times we were prevailed upon, even, to ad-

31262 just the stock that a man may have had in his warehouse; but since the N. R. A. we have had a flat policy of five days, and when the price was reduced we immediately went over our records, and any shipments that had gone out, or was en route, within the past five days, we sent the customer a credit memorandum to adjust the invoice.

Q. And was your purpose in initiating that practice that of complying with the requirements of the Code of Fair Competition for the Cement Industry?

A. Yes, sir; it was.

Trial Examiner Norwood: Did you continue that after the Code?

The Witness: Yes, we practice that policy today.

Trial Examiner Norwood: Well, what is the purpose of continuing it?

The Witness: To gain the good will of the customer, and it seems to me a fair policy.

Trial Examiner Norwood: Well, then, is that followed in the matter of price reduction?

The Witness: It is followed in the matter of price reductions, Your Honor.

Trial Examiner Norwood: Well, it obtains in the matter of price raises?

The Witness: No, on price raises, the man does not ask you to bill him at a higher price for the stuff you
31263 have already sold him. He does just the reverse. He comes to you and floods you with orders, and have you load up his warehouse. That is one reason why it is so long for a new price to become effective.

Trial Examiner Norwood: I know, but when you announce a new price that way it certainly wouldn't make good will with the dealer to put it in immediately and not give him time to place a little order—

The Witness: We do—

Trial Examiner Norwood: —at the older price.

The Witness: We do, we give him five days in which to place business with us. In other words, we say the price—the quotation may be dated the 6th, and effective the 11th.

Trial Examiner Norwood: Yes.

The Witness: Our price becomes so and so, that gives him a five-day period to load up.

Trial Examiner Norwood: That is what I asked you,

whether or not you have a five-day period in the case of a price raise.

The Witness: I misunderstood your question, sir. Excuse me.

Trial Examiner Norwood: Yes.

Go ahead.

By Mr. Brick:

31264 Q. Well, pursuing that a little further, Mr. Ackerman, in connection with a price advance what effect does that have on your existing contracts?

A. Oh, we are stuck. Our contract is written at a figure, at which we agree to deliver cement irregardless of what our market price may be. That is a commitment on our part, to deliver the amount of cement called for under the terms and conditions of the contract, until the job is completed, or the contract completed.

Q. Now, with regard to similar contracts for specific jobs, what is the effect when there is a price reduction, in so far as the customer holding the contract is concerned?

A. Well, every contract of ours contains what we call a decline clause, which gives the customer the benefit of the new price provided it is lower.

Q. How long does it normally take you to obtain the benefits of a price advance with regard—taking into account the part of your total shipments which you can deliver at an advanced price?

Mr. Paulson: I object; that is clearly irrelevant to any issue in this case.

A. We—

Trial Examiner Norwood: Well, the only point is this: It has been covered and explained so much. It would probably never be denied. It has not been denied or re-
31265 pudiated in any way. I do not see why Counsel wants to go into it again.

Mr. Brick: Well, I am not now treating of the fact—I think the fact, Your Honor, is well established, but I would like the witness to state the effect from that condition. In other words—

Trial Examiner Norwood: That has been explained to us, too.

Mr. Brick: —the price— Pardon me?

Trial Examiner Norwood: That has been explained to us, too.

Mr. Brick: I think not. This company certainly hasn't had an opportunity to do it.

Trial Examiner Norwood: After he ships his present orders there is testimony to the effect that it takes some little time, a week or two before he begins to realize anything on the increase, even if his competitors follow it.

Is that not the case?

The Witness: No, sir; it is not the case. It is probably three or four months.

Trial Examiner Norwood: Yes.

The Witness: Before we get the benefit of anything at the new price.

Trial Examiner Norwood: And all that has been
31266 explained to us.

The Witness: And probably six months.

Trial Examiner Norwood: Yes.

Go ahead.

Mr. Brick: Well, apparently Your Honor missed it. You suggested a week and the witness said six months.

Trial Examiner Norwood: I said some little time.

By Mr. Brick:

Q. Now, Mr. Ackerman, how long does it take you to get the full benefit of the price advance?

Mr. Paulson: I object.

Trial Examiner Norwood: Sustained.

Mr. Paulson: It is clearly irrelevant to any issue in this case.

Trial Examiner Norwood: Sustained. He has already told us all that is necessary about that.

Mr. Brick: Well, I offer to prove, if permitted so to do, that the—

Trial Examiner Norwood: Now, the question and the ruling shows exactly what you offer to prove. It is not necessary to make any offer of proof about that.

Mr. Brick: Well, does that mean that I am directed not to make an offer of proof?

Trial Examiner Norwood: That means that I should like within any means within my power to discour-
31267 age a long offer of proof here about this ruling about the one question. I ruled it out because he had already given us the information, and an offer of proof is not in order.

Mr. Brick: I do not see how Your Honor knows what information is coming out at every stage.

Trial Examiner Norwood: He has just answered the question a short time ago, or one to the same purport.

Go ahead.

By Mr. Brick:

Q. Mr. Ackerman, with respect to the policies of your competitors as relate to conditions of sale affecting price advances and price declines, have you found that competitors of yours had such a five-day retroactive decline clause in their conditions of sale?

A. Yes, sir; they have.

Q. When did you first find that competitors were following such practice?

A. At the time of the N.R.A.

Q. Do you find that competitors have continued that practice since the N.R.A.?

A. Yes, sir.

Q. What would be the effect if you changed the practice and substituted either no period at all or a two-day period instead of your present five-day period while your competitors adhered to the five-day period?

31268 A. I would lose my customers.

Q. I will ask you first, have you ever tried it?

A. No, sir; I have not.

Q. Why didn't you try it?

A. Because I did not want to lose all my customers.

Q. In what way would you lose all your customers?

A. Well, they would buy from the man that gave them a better deal than I would.

Q. Mr. Ackerman, have you ever had any understanding or agreement with any of your competitors concerning any conditions of sale or terms of sale, either promulgated by your company or any other company?

31269 A. No, sir; none whatsoever.

Q. Has your company ever regarded The Cement Institute as a formulator of policy with respect to prices or sales policies?

A. No, sir.

Q. So far as you know, has The Cement Institute ever had anything to do with the fixing of prices of cement?

A. None that I know of, sir.

Q. Have you ever received any instructions from The Cement Institute with regard to what you should do in the ordinary sale of your product?

A. No, sir.

Q. Now, you have told us, Mr. Ackerman, that your company follows a one-price policy. Just what do you mean by that?

A. We make the same price to all customers of the same class in the same market.

Q. Do you ever quote any prices to customers which are less than your published quoted prices at the particular point?

A. No, sir; we do not now.

Q. Now, for how long is it that your company has had a policy in that regard which did not permit it to quote lower prices?

A. Welk, for approximately 15 years.

Q. What was your policy prior to that time?

A. Well, there was a time when we did make secret rebates or special allowances in the cases of large cus-
31270 tomers, large accounts. It got us, we thought at the time, additional tonnage, but we soon learned that we had a reputation of making special prices, and those people who heretofore had been satisfied to pay us our market price, complained that we were treating somebody else better and they were not going to do business with us any more, and I think we lost more business than we gained. That was my opinion at the time. We eventually cut out any special rebates or extra discounts or special prices of any character, and announced a very definite one-price policy and have adhered to it.

Q. Well, what was the effect, Mr. Ackerman, when you gave five or ten cents a barrel under your quoted price to, we will say, a good customer? That is, I suppose, he were a dealer who bought fairly large volumes of cement from you. You did have such situations, did you not?

A. Yes, sir; we did.

Q. And what was the effect of that?

A. Well, the effect was that the dealer having an extra margin of profit, you might say, to play with, reached out into other dealers' territory and took business away from them with our cement, from our—from the very dealer that we were doing business with. That man came to us and said, "How is it that so and so can undersell me in my own town?" Well, we found ourselves in a very undesirable position and we found that we were losing accounts,

and other people that had been with us for years
31271 were distrustful of our methods, and we lost more business than we gained by that policy, and we changed it and went back to a straight policy, and we had some time in convincing people that we were doing what we claimed we were doing.

Q. Did you find that at that time, Mr. Ackerman, there was any difference in the type of customer you had as compared with the type who purchased from you when you had a one-price policy, and that you might consider it from the standpoint of repeat business?

A. Well, it was—I do not know that there was much difference in the character of the customer, but I have always felt that it is the wisest policy for our company, at any rate, to try to have as many small accounts as possible rather than concentrate on a few big ones. You lose one big one, you have lost a large part of your annual business, and I like to spread our business around as widely as possible.

Q. Now, at the time that your company granted concessions in price allowances to customers how were such customers invoiced?

A. Oh, they were invoiced at the market. We attempted to keep the thing secret. When the man paid his bill he took off an extra nickel, and the transaction was supposed to be confidential but it did not turn out that way.

Q. Did you have many large customers at the
31272 time whom you favored with concessions?

Mr. Paulson: May we have the time fixed? We lost it if it has been fixed.

By Mr. Brick:

Q. Mr. Ackerman, will you fix the time?

A. Well, it was approximately a little over 15 years ago, I would say, Mr. Paulson. There was a period in there when we were making more or less concessions to certain people.

Q. Now, you have told us that the Lawrence Company had used The Cement Institute rate books.

A. Yes, sir; we used them.

Q. Have you used those books since the institution of this service?

A. Yes, sir; I think so.

Q. Has your company ever published its own book?

A. No, sir.

Q. When you first came to the Lawrence Company do you recall whether or not the company used freight rate books of one sort or another?

A. Yes, sir; they were using freight rate books, 1920.

Q. And what was the source of those books?

A. I think they were gotten out by the old Cement Manufacturers Protective Association.

Q. And after the Protective Association was dissolved, what was the source of your book?

31273 A. As I recall it, the Nazareth Traffic Bureau came into being, which was a group of the smaller mills in the Valley, that worked out this service. I do not remember whether or not that preceded the Young service or not, but the Young service did not amount to very much; did not last very long.

Q. Now, you say you use the Institute books. When did your company first become a member of the Institute?

A. At the time of the N.R.A., as I recall it. When was that, 1933?

Q. Yes.

Now, in subscribing to the Freight Rate Book Service of the Institute during the period when you were not a member of the Institute, did you pay any subscription price for the services?

A. Yes, we subscribed to the books, as I recall it; we paid approximately $75 a month for the service.

Q. As to the books which you have been using lately, did you find that there are more or less headline points in the books as compared with the books which you used formerly?

A. Oh, there are more headline points today.

Q. Did your company have any voice in determining the headline points which appear in the Institute book?

A. Oh, yes.

31274 Q. Have you any understanding or agreement, or have you ever had any understanding or agreement with any of your competitors with regard to the use of the Institute freight rate books, or any other freight rate books?

A. No, sir; none whatsoever.

31275 Q. Do you recall, Mr. Ackerman, having attended a meeting of The Cement Institute in August, 1929?

A. Yes, sir; I do.

Q. Was the Lawrence Company at that time contemplating membership in the Institute?

A. Well, I went to that meeting to hear what was
31276 contemplated in the way of an Institute, and to report what took place at the meeting.

Q. Did any other representative of your company attend the meeting?

A. No, sir; I don't think they did.

Q. How many of those meetings did you attend?

A. I think that was the only one.

Q. When did your company make a decision not to join the Institute?

A. I reported back to Mr. Smith what took place at the meeting,—Mr. Smith was then president of our company,—and he decided that we would not join at that time.

Q. What was the reason for the decision, if you know?

A. Well, Mr. Smith was never what I would say a joiner. We had been losing money, and he was not anxious to incur any further obligations for the company at that time.

Q. At any later time prior to 1933 did you give the matter of joining the Institute any further consideration?

A. I don't think so.

Q. Now, it appears in the minutes of that meeting, Commission's Exhibit 136, that you were appointed a member of a committee to consider a particular paragraph of a proposed code of ethics. Do you recall that?

A. Well, I recall that it was proposed that I serve on some such committee, but I never did.

31277 Trial Examiner Norwood: When did you finally join the Institute?

The Witness: About 1933, Your Honor.

By Mr. Brick:

Q. What was the occasion for your joining at that time?

A. Well, as I recall it, the Institute, you might say, was more or less revived, or was looked upon as the vehicle through which we could present the industry's problems to the N.R.A.

Q. Have you ever had any agreement or understanding with any of your competitors with respect to the allocation of respective sales territories?

A. No, sir.

Q. Have you ever had any agreement of that kind relating to any allocation of business?

A. No, sir.

Q. Do you recall, Mr. Ackerman, that a compendium was distributed by the Trade Practice Committee of the Institute,—do you recall that?

A. No, sir; I do not.

Q. Well, it appears in the record that such a document was prepared and issued to members of the Institute at the time the Trade Practice Committee of the In-
31278 stitute abandoned its activities, and I think it was called a compendium of established marketing practices. Do you recall ever having received such a document?

A. No, sir; I do not.

Q. Mr. Ackerman, have you ever at any time had any agreement with any of your competitors with regard to the elimination of trucking from mills, or anything relating to conditions under which deliveries might be made by truck?

A. No, sir.

Cross-Examination by Mr. Paulson.

Q. Mr. Ackerman, you said on direct that you sold cement for use in building of locks on the Mississippi River; is that right?

A. The company did; yes, sir.

Q. When was that?

A. Oh, about 1910, I should say.

Q. What price was it sold at?

A. I don't know, sir.

Q. About what price was cement selling for in the territory in which the locks were built at that time?

A. I haven't any idea.

Q. When did you come with the company?

31279 A. In 1920.

Q. What were you doing five years previous to that?

A. I was—

Q. All I want to know is were you in any way connected with the cement industry,—that is all I want to know.

A. No.

Q. Did your company sell beyond the Mississippi River since you came with it?

A. No, sir.

Q. Have you any idea what the price of cement was west of the Mississippi when the locks were built on the Mississippi?

A. No, I have no idea, sir.

Q. You said that you had to abandon certain territory in the last 10 years, I believe it was? That is correct, is it not?

A. We have abandoned territory in the last 10 years; yes, sir.

Q. I suppose you abandoned some in the 10-year period prior to that time, too?

A. I couldn't hear that.

Q. I say, I suppose you abandoned some in the 10-year period prior to that, too?

A. Oh, yes.

Q. What is the first time you abandoned territory, in your recollection?

A. Oh, when I first came with the company.

31280 We used to do a great deal of business in West Virginia. At that time we had a distributor in Cumberland, Md.

Q. And the time, please?

A. Oh, I said when I first came with the company,—I will say the year 1920 or '21.

Q. What was the price in West Virginia?

A. Oh, I don't remember those things, Mr. Paulson. I don't know.

Q. You don't have any idea to make us a general range?

A. Well, yes—I would say it was somewheres—let us see, somewheres between $1.85 or $2 at the mill. When you say "price," I mean that's return that we got on cement that we sold into Maryland and West Virginia, and we had this distributor there, used to get rid of a lot of cement for us in West Virginia, and that area, but increased competition in the Maryland mills, and other mills in that area virtually drove us out.

Q. Well, when you abandoned western Pennsylvania, what price prevailed in the western Pennsylvania market, —using "market" in the sense that you use it?

A. Well, that's difficult for me to say. I am not trying to duck your question, I want to answer it.

Q. No, I realize that it is difficult to remember. I just want to get an idea of the range, not the exact price; I did not—

31281 A. Well—I would say that as far as western Pennsylvania is concerned, that probably goes back before my time, and is somewhat in the category of that lock job on the Mississippi River that I referred to. I know there was a time when we used to ship a lot of cement in Pittsburgh, for example.

Q. Well—

A. That would be prior to the time of the establishment of the mills just outside of Pittsburgh.

Q. Let us see if we can find some territory that you have abandoned since you have been active in the company.

A. Well, Buffalo.

Q. Well, what was the price, the average price, in Buffalo when you abandoned that market?

Mr. Brick: May we fix the time, please?

By Mr. Paulson:

Q. Yes, fix the time.

A. Well, we got out of Buffalo gradually, I would say from 1930, 1932 on. That was more a question of ability to give satisfactory service, or competitive service, than it was a question of price. I would be willing to sell cement in Buffalo today if I could get it, if I could get the business.

Q. Well, my line of questioning, I do not mind saying, was directed to finding out the relative level of prices when you were in the market and when you abandoned the market, and I don't know whether you can help me out on that or not.

31282 Did the price—was it because of price reductions that you abandoned the market at Buffalo?

A. No, no. We were sort of forced out. We lost our customer. He would not continue to buy and each year he bought a little bit less, and bought more of somebody else's, until eventually he didn't buy any more.

Q. Do you know, of your own knowledge, whether or not the cement that was sold by your company to the Mississippi locks was sold at a destination price which is

less than the price which is in existence today in that same territory?

A. Oh, I am rather inclined to think it was a lot more.

Q. Whereabouts were those locks?

A. Well, they are at the head of the Mississippi River. The reason I happen to be somewhat familiar with it is because at one time our company published a house organ, and the article was prepared and written up under my supervision. Now, I don't remember, I am sorry to say, the exact spot.

Q. Was it Itasca in Minnesota?

A. Beg your pardon?

Q. Was it Itasca in Minnesota?

A. Well, that sounds familiar. It was a Government lock, built by the Government.

Q. Is there a price at junction points—railroad junction points?

A. We have a price at junction points of the 31283 railroads that we serve.

Q. How do you fix that price?

A. Well, it is usually a competitive price; it is somebody else's price that we meet.

Q. Well, does somebody else publish a price for a junction point?

A. Well, no, but the railroad tells us what we are up against.

Q. Well—

A. In other words, there is a mill located on practically every railroad that does business.

Q. Yes, I understand, but on direct you said that your price to the railroad is f.o.b. your plant, if the railroad serves your plant, and f.o.b. junction point at your nearest junction point if you are not on the road.

Now, as I understood it, you testified that your general method of pricing is to pick up your competitors' quotations. Now, I want to find out how you find out this price at the junction point? Do they have a quotation for a junction point?

A. Yes, no doubt.

Q. Competitors issue quotations for the junction point?

A. Well, the competitors will quote the railroad.

Q. Quote the railroad—

A. Just like—

31284 Q. —delivery price at point A and point B, or how?

A. No. In this instance I have in mind, which is Phillipsburg, which is a junction point for the Jersey Central Railroad, whose irons serve our mill, and the Pennsylvania Railroad, I have in mind that the Pennsylvania Railroad is in the market for cement and they will ask us to quote them f.o.b. their irons and we will select the nearest junction point which is Phillipsburg.

Q. How do you know what price prevails at Phillipsburg? That is, how do you know what price your competitors are quoting the railroad at Phillipsburg?

A. From the railroad.

Q. Oh, then, when they ask you for quotations—

A. Remember, the railroad is a good customer of ours; is a good customer, I will say, for all the cement companies, because they haul a lot of freight, and it is no difficult task for us to find out what the picture is.

Q. Well, where do the railroads get their information as to the price at the junction point?

A. Well, it will get its information from the cement mill having a mill on its line.

A. Well, your railroad could not get that information from you, you don't have it.

A. Why, sure, they could. I quote them all the time, any time they want it.

31285 Q. You quote them an f.o.b. mill, as I understand it—you quote the railroad on which your plant is located an f.o.b. mill price?

A. That is right, f.o.b. cars.

Q. You don't quote them a junction price, a price at the junction point?

A. I quote the railroad on which our mill is located f.o.b. car, their track, our mill.

Q. Now, what is the price at the nearest junction point on that railroad; what is your price?

A. I have no price at somebody else's junction point.

Q. I say, what is your price at the nearest junction point on the railroad on which your plant is located?

A. I have no price at that junction point.

Q. Then, your competitors cannot find out your price at which—at that junction point, can they? You don't have any.

A. No, but they know my price on the railroad, don't they?

Q. Yes.

A. Well, that is what they are going to have to meet if the railroad is going to give them any business.

Q. At the nearest junction point they will quote your f.o.b. mill price?

A. That is right.

Q. Then the railroad gets an f.o.b. mill price no matter where it buys cement?

31286 A. Very often it gets an f.o.b. mill price at the point where there is no mill or merely a junction.

Q. Why did you interject this junction point in the picture?

A. Well, that is what I do in the instance when I quote the railroad on whose irons I am not located.

Q. Then, you are really quoting your competitor's f.o.b. mill price?

A. It may amount to that.

Q. Does it amount to that?

A. In some cases it does; yes, sir.

Q. Does it in all?

A. No, not in all cases because there are railroads that have no mill on their line.

Q. Then, what do they do?

A. Well, you tell me what they—

Q. What quotations do they receive?

A. It depends on what they ask for. If they have no mill on their line they may ask you to quote at the destination at which they are going to use the cement. Very often they do.

Take the Staten Island Rapid Transit Company, for instance, on Staten Island, as an illustration. We quote them at whatever station they name in their inquiry, our destination price at that station.

Q. Do you quote them your commercial destination prices?

A. I quote them our commercial destination prices; yes, sir.

31287 Q. But a railroad upon whose lines a cement mill is located can buy its cement for use anywhere along that line at the f.o.b. mill price of the mill who is located on the railroad?

A. Now, you are taking in a lot of territory when you say that. Remember, my direct business experience relates in the area I described. I do not know what they do outside of our area.

Q. I will ask you to confine yourself to that.

A. But the Pennsylvania Railroad and the New York Central Railroad, and the Jersey Central Railroad and the Reading Railroad all have mills on their line, and they buy at either there, from the mill on which—let me correct that, please: They buy it from the mill located on their line or a competitor's mill at the nearest junction.

Q. At what price?

A. At a price equivalent to the mill base.

Q. Of the mill on the line?

A. Of the mill on the line.

Trial Examiner Norwood: That is, you stand the freight absorption, then, from your mill to the junction point in case it is a railroad who does not serve your mill?

The Witness: Yes, sir.

By Mr. Paulson:

Q. Now, I just want to clear up a point that 31288 came up on direct which I think was cleared up, but I am not sure.

Mr. Brick asked you how does the drop in sales affect your total selling cost, and you said it—or he said affecting your selling cost, I believe, not total, and you said, "It materially raises our selling price." Do you recall some such testimony as that?

A. Yes, sir; I do.

Q. The subject is all I am trying to direct your attention to. Well, the drop in sales really does not affect your total selling cost, does it?

A. Yes, sir; I think it does.

Q. How?

A. Well, we pay a salary and the salesman's expenses. We have sales offices and clerks and rent. Now, the larger tonnage we can use as a divisor the smaller our selling cost.

Q. That is the point I want to clear up. It raises it per barrel but not total selling cost, aggregate?

A. The amount of dollars paid in a year's time would not change. However, if we found that, we felt it was necessary to shorten selling cost by discharging salesmen, or any other fashion, cutting down expenses, we do so.

Q. Yes, but your statement on direct was made with you having in mind barrel costs rather than total selling

price when you said that it materially raised the cost, selling costs?

A. I had that in mind.

31289 Q. You said that you bid f.o.b. mill to the Government on the Passamaquoddy project; isn't that true?

Q. What price was bid? What delivered price was bid —strike that.

What was your bid figure, put it that way?

A. Well, do you want it—do you mean $1.75, or $1.80, or whatever it may have been?

Q. Yes.

A. I do not recall that. I can't help you a little bit on that.

Q. Was Passamaquoddy a commercial market?

A. Well, Eastport. Passamaquoddy was the name given to the project. Eastport, Me., was the point at which the dam was to be built and at which they were doing a certain amount of work, Eastport, Me.

Q. All right. Just how did the price that you submitted to the Government f.o.b. mill compare with the commercial price considering the freight differential in the two prices?

A. Well, we quoted— May I have the question again, please?

Trial Examiner Norwood: Read it.

(Question read.)

A. You will have to make that question clearer, please.

By Mr. Paulson:

Q. All right. I will be glad to.

31290 Did you offer to deliver cement to the Government at a lower destination cost than you at that time were offering to deliver cement in Eastport?

A. Yes, sir; we did.

Q. How much lower?

A. My recollection of it was 19 cents.

Q. How do you account for that?

A. Our commercial price at Eastport was $3.04 and our price to the Government at Eastport was $2.85.

Q. Are you in the habit of making quantity discounts to the Government like that?

A. In the first place I do not think that was a quantity discount; in the second place, I am not in the habit of making quantity discounts to anybody.

Q. Why did you give the Government a more favorable price?

A. Because the Government had negotiated with the Maine Central Railroad a special rate of freight to haul freight from Rockland to Eastport, and we gave the Government the benefit of the reduction they had been able to negotiate.

Q. Then I guess we did not understand each other. Had the commercial world been able to take advantage of that rate you would have been offering the Government a no-different destination cost than the commercial buyer?

A. That is right.

Q. In other words, your mill net was calculated
31291 to be the same on the Government bid as was the case on the commercial offer?

A. Yes, sir.

Q. In other words, you bid Eastport, less freight, to the Government?

A. You can figure it any way you want to.

Q. Isn't that true?

A. I bid the Government $2.85 at Eastport.

Q. Well, you subtracted the freight rate; prevailing freight rate, from Eastport, and bid the Government the remainder?

Trial Examiner Norwood: Is that less commercial freight?

Mr. Paulson: Yes.

Trial Examiner Norwood: Yes.

By Mr. Paulson:

Q. Is that what you did?

A. I do not think that is what we did do. We gave the Government a price of $2.85 at Eastport.

Q. Well, that is what $2.85 is at Eastport, isn't it? I thought you said f.o.b. mill.

A. No, sir. I did not say $2.85 f.o.b. mill. I said $2.85 Eastport.

Q. I thought you said that you bid, on direct, f.o.b. mill?

A. That is correct; we did.

Q. What was the price you named f.o.b. mill?
31292 A. If you can tell me what the freight rate was from Rockland to Eastport, and subtract it from $2.85, you will have the figure we named to the Government. I do not recall what the freight rate was.

Trial Examiner Norwood: That is, you bid the delivered price, the regular commercial delivered price at Eastport less the commercial freight—I mean, you bid a figure equal to that, did you, as an f.o.b. mill bid; is that right?

The Witness: I do not think that is quite right, Your Honor. We bid a price to the Government at Eastport of $2.85 a barrel laid down in Eastport. Our commercial price at Eastport was $3.04. The way we arrived at our $2.85 delivered price at Eastport was to subtract from $3.04 the difference in the commercial freight rate, and the special freight rate the Government got, and subtract that difference from $3.04, which gave us $2.85.

By Mr. Paulson:

Q. Well, that amounts to the same thing, does it not?

A. It amounts to the same thing—what is the same thing?

Q. The thing that His Honor and I each put in separate questions; namely, that you bid the destination cost which you bid to the Government as the Eastport price less commercial freight plus land-grant rate?

A. Well, it was not a land-grant rate. It was a 31293 special rate. That is another way of saying the same thing.

Q. Yes.

A. I will agree to that.

Q. Apparently you bid an f.o.b. destination and an f.o.b. mill price to the Government?

A. That is right.

Q. And your f.o.b. mill price was Eastport less commercial freight.

Trial Examiner Norwood: Eastport commercial price less commercial freight.

The Witness: Now, you are right.

By Mr. Paulson:

Q. Yes. That clears that up.

You said on direct that your sales to the Government amount to 1 percent. Do you recall that?

A. I said not more than 1 percent, I think.

Q. How much do your indirect sales to the Federal Government amount to, Mr. Ackerman?

A. Well, we do not keep any records on that, and that all depends on what you include in indirect sales to the Federal Government.

Q. Well, you analyze your market from day to day or month to month, don't you?

A. We attempt to analyze our market daily.

Q. Is the Government indirectly one of your
31294 most substantial purchasers?

A. Well, I am not trying to be tricky with you, Mr. Paulson, but before I can answer your question I have got to understand exactly what you mean. Now, the United States Government—

Q. I do not know any more about this case than you do.

A. The United States Government contributes a certain amount of money known as federal aid to the building of highways in the various States. Now, do you include —are you including that in your classification, or not?

Q. Yes, sir; in direct sales to the Federal Government.

A. Well, that is not a sale to the Federal Government.

Q. Well, indirect purchases by the Federal Government.

A. Well, that's different,—and the Government— Let us have it so we understand one another. That is all I want to do, Your Honor, is to make it clear.

Q. That is all I want to do, too. I am asking you for your testimony as to the amount of cement manufactured by you; that is, eventually paid for out of federal money, directly and indirectly.

A. Well, you right away exclude there highway, because, after all, the State provides most of that money. Now, I—

Trial Examiner Norwood: Well, include in that—

The Witness: I haven't any idea.

Trial Examiner Norwood: —cement that is paid for in whole or in part by the Federal Government.

31295 The Witness: I am sorry, but I haven't any idea what that would be. I will venture a guess, if you want me to.

By Mr. Paulson:

Q. Well, I thought you had studied your—

A. You mean—take a little house built outside somewhere, maybe a Home Owners' Loan Corporation loaned some money. Now, the Government is directly in that, and you can't—take a little block plant, maybe a man has come down here and got a small R. F. C. loan to keep his plant going. Is that an indirect thing? It seems to me you can take in an awful lot of territory.

Q. Take in about 70 percent of your business?

A. You might take in—if you go to that extent—I think probably you would, and maybe more, if you include taxes.

Q. Have you calculated the amount of cement you have sold through your dealers to projects paid for directly by the Federal Government, such as W. P. A. projects?

A. Well, we have some sort of a rough calculation, but you must remember that when a man buys a car of cement from us he doesn't tell us what he is going to do with it, and we have no way of knowing what he is going to do with it.

Q. What is the basis for your rough calculation? What have you calculated?

A. Well, the one percent is an actual calculation
31296 of direct sales.

Q. What else have you calculated?

A. On direct sales to the Federal Government?

Q. Well, what else have you calculated with regard to sales to the Federal Government, directly or indirectly?

A. None.

Q. I see.

A. It is practically an impossible calculation, Mr. Paulson.

Q. I understand.

A. We don't have the information to enable us to calculate it.

Q. What percentage of the destination price at which you sell cement on a basing-point delivered price basis?

A. Please read that question again.

Q. Strike the word "basis"?

A. What do you mean by "basing-point delivered price basis"? Let us be sure we understand one another on that.

Do you mean what percentage of our business is sold at points at which a base price of a mill is reflected?

Q. Yes.

A. What year?

Q. 1939.

A. I have no figures, but I will venture a guess—75 percent.

Q. Won't it go higher than that?

31297 A. No, sir; not when you figure I am going on a barrelage basis, on volume, not the number of stations.

Q. That is what I asked you, though, was the number of stations.

A. Well, now, number of stations—well, it would be higher than that, I would say, on the number of stations; in other words, we might make 20 shipments to the same station.

Q. It would be 99 percent?

A. Oh, no.

Q. Well, what stations are not on formula basis in your territory?

A. Well, I don't carry all of those in my head, but I will get you—

Q. You stated three on direct examination. Are there any more? You named New York, Westchester County, and Long Island?

A. How many stations do you say there are in New York,—Westchester County and Queens and Long Island?

Q. All right.

A. My gracious!

Mr. Brick: I don't think there is a New York station.

The Witness: No, I don't, either. I would like to see it.

By Mr. Paulson:

31298. Q. Outside of those—

A. I said Greater New York, I think, Mr. Paulson.

Q. Yes. Isn't Greater New York tied to the base point now?—

Mr. Brick: I don't see—

Q.—in—

A. Wait a moment. What do you mean by "tied to a base point"? I am not going to answer any of these questions unless I know what I am answering.

Q. That's right, do not answer unless you are clear on this, because I don't want your answer to be anything that is not understandable by anyone who will read the record.

That is, the delivery price now prevailing in New York, some base price plus freight, or the lowest combination of such base and freight.

A. There are destinations in Greater New York which have a price which reflect the Lehigh Valley base, or the Siegfried base.

Q. Most of the destinations in New York, would you say?

A. No.

Q. Half of them?

A. No, sir; not 2 percent—well, wait a moment, make that 5 percent; 5 percent.

Q. What do the rest of them do? How do the rest of the destination prices in New York compare with those prices, that 5 percent of prices—those prices at that
31299 5 percent of destinations which are related to the base?

A. How do those prices compare?

Q. Yes.

A. With the prices—the prices are the same.

Q. Then all of New York is tied to a base?

A. Oh, well, now, that's just the point; you are getting—wait a moment, let us understand one another, when you say they are all tied to a base.

Q. Yes.

A. I say yes, there is always a starting point for everything.

Q. Yes.

A. If that's what you want me to concede, yes, there is a starting point.

Q. Yes.

A. Now, you have a price in New York, we will say, at 138th Street, that's a station. There is no station known as New York that I know of. All right, you move up to the next station, which may be 145th Street, and that's the name of a station, which is in the tariff, you will find 145th Street.

Q. Yes.

A. Our price at 138th Street, we will say—I don't know what it was—but we will say—

Q. Say it is Northampton plus freight, can't you?

A. It gives you $2.50.

31300 Q. Is that what it is at that station, Northampton plus freight, at that station?

A. Well, now—I will not try to be tricky with you, but I don't want you to be tricky with me. Is there a Northampton—

Q. Well—

A. Yes, there is a Northampton.

Q. Well, Siegfried.

A. Well, Siegfried, plus freight.

Trial Examiner Norwood: Now, now, one at a time.

The Witness: All right.

Now, you have 138th Street—145th Street may have the same rice, but that will not be Siegfried plus freight.

Do you follow me?

By Mr. Paulson:

Q. Well, I follow you, yes—I don't agree with you, but I follow you.

A. Therefore, you say that 145th Street ties back to 138th Street, then, in that it is Siegfried, plus freight.

Q. Yes.

A. Now, if you will see the reason—the reason we make 145th Street the same as 138th Street—I say we make it not because the railroad company makes the same rate at 145th as they do at 138th. The reason for that is because the dealer serving that area may take delivery at either this point or the other.

31,301 Q. Now, that same principle applies throughout the Greater New York area?

A. The same principle of keeping those prices adjusted one with the other, all of which go back to one starting point; yes, sir.

Q. That's correct.

I am not attempting to ask you tricky questions, Mr. Ackerman.

A. Well, I know you are not, but your use of cement language, and my use of cement language may mean the same, and may be different language.

Q. Well, now, what did you mean when you answered on direct that New York, Greater New York, destinations were not attached—or related to a basing point?

A. I didn't say that, now.

Mr. Brick: He did not say that.

Mr. Paulson: Didn't he?

The Witness: I will stick with you if you will stick with my language.

By Mr. Paulson:

Q. Then we will eliminate— Then if is correct, is it not, to eliminate New York as an exception, with the explanation that you have made—to eliminate New York as an exception, too?

A. I would say that 138th Street in the illustra-

31302 tion I gave you reflects a base, and 145th Street does not reflect a base.

Q. All right.

Now, in Long Island the same principle would apply—you would start with some destination point, perhaps the one closest to the Lehigh Valley?

A. Bush Terminal.

Q. And the price at Bush Terminal would be the Lehigh Valley base plus the commercial freight, and then all of the rest of the points adjacent to the Bush Terminal would be the same—would carry the same price?

A. That's correct; substantially the same price; as you get a little bit further out they would begin to go up.

Q. And the same is true at Westchester County?

A. Yes, sir; but—

Q. And all of those three—

Trial Examiner Norwood: But then if that is—

The Witness: What is that, Your Honor?

Trial Examiner Norwood: Never mind.

By Mr. Paulson:

Q. And all of those three points, New York, Long Island, Westchester County.

(Non answer.)

Q. Do you know of any destination point in your sales territory which is not related to a base point?

A. At the present time, with the possible exceptions of—that I mentioned—of Watuppa, Mass., this morning, and Fall River, and I mentioned Brewer and Bangor, and there may be a dozen or two more similar cases.

31303

Q. Well, then, outside of New York, Long Island, and Westchester, what percentage of the destinations would you say are related to base points in your sales territory?

A. All of it would.

Q. Except those?

A. Yes, sir; except those miscellaneous—or points here and there.

Q. How do you account for those few miscellaneous points?

A. Well, it is a situation similar to what I attempted to describe between 138th and 145th Streets; Watuppa and Fall River are side by each, and the freight rate jumps in between. We absorb it and make our price the same as the lower of the two.

Q. In other words, you in your pricing eliminate the freight rate differences of one customer over another?

A. In that instance.

Q. Where the customers are—
A. In competition, one with another.
Q. —in competition?
A. Right.
Q. Outside of that your destination prices in your whole sales territory are some base points plus
31304 freight—to be more exact, the lowest combination of base point price plus freight?
A. They reflect that.
Q. Yes. And that price pattern has been in existence, to your knowledge, for how long?
Mr. Brick: Oh, I object to the characterization—
A. What do you mean by that.
Mr. Brick: —price pattern. I don't know just what this price pattern refers to.
Trial Examiner Norwood: The objection is overruled.
The Witness (addressing the Trial Examiner): Well, would you mind asking him to tell me what he means by "price pattern"?
Trial Examiner Norwood: Tell him.
Mr. Paulson: I do not mind.

By Mr. Paulson:

Q. I mean, the lowest combination of base point price plus freight, or base plus freight price—that is what I mean by that.
A. May I have the corrected question, please?
Trial Examiner Norwood: The price methods which you have described to us here.
The Witness: During my whole testimony, the price method? Now, how long has that been in existence?

By Mr. Paulson:

Q. Yes.
A. Ever since I have been connected with the
31305 Lawrence Portland Cement Company.
Q. It is safe to say ever since you have been connected with the Lawrence Portland Cement Company you and your competitors, to your knowledge, have sold on delivered prices?
A. We have sold on delivered prices ever since I have been connected with the Lawrence Portland Cement Company. I cannot speak for what my competitors did, but I believe they have.
Q. It is also safe to say that you have sold on de-

livered prices calculated by adding commercial freight to—

A. Not necessarily.

Q. —to base points?

A. Not necessarily.

Q. Why not?

A. Well, because there have been many, many more cases than what we have described in the year 1939, when there were a great deal larger percentage of prices which did not reflect a base.

Q. How many base points are there in the sales territory in which you operate?

A. Well, I don't know how to answer that question. We have a base at our mill at Rockland, Me.; I would say there are enough prices in the field to indicate that there is a base at the Hudson-Alsen group of mills on the Hudson River, and enough to establish the fact that there are bases—I know we have one in our own plant in the Lehigh Valley. Now—

31306 Q. In other words, you have three base points to watch?

A. Well—

Q. And, of course, you have to watch for the growth of any new business, but you do have three that you know of that you have to watch now?

A. What do you mean to have to watch?

Q. In order to know what your competition is?

A. I do not have to watch the base mill to know what my competition is. You said you would not be tricky.

Q. Well, you do not have to watch your base; is that your testimony?

A. No, I did not say that, make that statement, either.

Q. Well, you do have to watch the base, then?

A. I did not say that.

Q. Do you or don't you watch the base?

A. No, I don't watch the base.

Q. All right. Now, you don't watch the base; is that right?

Q. Now, let's see if you do not watch the base. On direct you said that you picked up quotations in the field in order to find out what base was reflected by them, didn't you?

A. I think I did.

Q. Now, are you watching the base or aren't you watching the base in that case?

A. No, I don't think I am.
31307 Q. We won't quibble about that.
A. I am watching the market.
Q. We won't quibble about that.
A. I am picking up— That's O. K. by me.
Q. About the terminology.
The point in your picking up quotations in the field is to find out what the price and basing points—what the figure at basing point is that is being used; is that correct?
A. No, sir; it is not correct.
Q. Well, let me understand how base points come into your daily routine of pricing at all. Will you make it plain to me?
A. I do not know as basing points do come into my daily routine, Mr. Paulson.
Q. I certainly misunderstood you on direct, then. I understood you to say in answer to His Honor—a question from His Honor, that you picked up few—some quotations in the field, then you analyzed them to determine from them that a certain territory was being governed at that particular time by some particular base point; is that what you said on direct?
A. I will ask you to show me the record. I don't remember.
Q. Well, is that a fact?
A. Is it a fact that I said that on direct?
Q. Is it a fact—did I describe the fact? Is it a fact?
A. Well, I don't know if it is a fact or not. Cer-
31308 tainly I am interested as a cement man in what is going on in the market. Now, there is no doubt of that, and any time there is a new price in the field I am anxious to know what effect it is going to have on the company I work for. I certainly am—I certainly make a very careful study and analysis of any new changes that come out; after they are out, they are out. I have either met them or refused to meet them.
Q. Don't adopt my language. I don't want you to do that. I want to hear it from you, but I do want to get the facts straight as to how you determine the price hat you will use at a destination point and at all the destination points at which you sell cement. Now, can you tell me briefly and concisely, or must I ask you a number of questions?

A. We determine our price at a destination based on what we believe the market is at that destination; that is how we arrive at our price, except in cases where we ourselves have taken, you might say, the initiative and established a new price at a destination.

Trial Examiner Norwood: Well, how do you arrive at what you believe the market price is at that destination?

The Witness: Well, Your Honor, I have been in business for 19 years myself. I have a price today at every station where I seek business. I know what it is today. How do I know? Because that is what it was yesterday, or the day before, or until such time back when there
31309 was a change, and it was public knowledge what the price was, and I change my—I maintain my price until I am ready to change it, or somebody else changes it, and then I have a chance of meeting the competition or withdrawing from the market.

By Mr. Paulson:

Q. That is, you sample the market every day?

A. I would say that I sample almost every market every day. We have, as I testified, 30 salesmen, including three district sales managers. We have a thousand accounts. If a salesman cannot call on five customers in a day he is off shooting pool or doing something else. Now, figure it out for yourself. These cards—you would not let us put in—I will show you how many calls a salesman makes on those particular accounts. That is one of the things I watch in my daily conduct of my business.

Q. Now, I understand that you are denying that you consider base points at all in calculating your delivered prices. Am I correct?

A. No, you are not correct.

Q. Well, then, how do you use base points?

A. Well, I have a base point in my own plant, haven't I?

Q. Well, outside of your base point you do not have regard in establishing your price and destination point for any other base point except your own; is that right?
31310 A. I think that is substantially true, Mr. Paulson.

When you say you do not have "regard" I am interested in what is going on, naturally. What do you mean by "regard"? You are trying to get me to say "yes" to something that you haven't fully explained to me, and I

am not going to say "yes" to it until I know that I can say "yes."

Q. I am sorry you are getting the idea—

Trial Examiner Norwood: Off the record.

(There was a discussion off the record.)

Trial Examiner Norwood: On the record.

By Mr. Paulson:

Q. I think I have given you every opportunity in the world to explain your pricing system without trying it over again.

Now, you say you do have regard for base points outside your own, other than your own. Now, just tell me what regard you do have for them, how do they enter into your issuance of quotations for delivery points, for destination points?

A. Why, I do not think they do. I have my own price today.

Q. Now, you issue quotations, don't you, periodically? You issue quotations, do you not?

A. I issue a quotation to cover a specific job when I think I have a chance of selling.

Q. You do not issue quotations to your customers from time to time?

31311 A. Just to name our price?

Q. Yes.

A. No, sir.

Q. Have you done that in the last five years?

A. Issue quotations from time to time?

Q. Yes.

A. No, sir. That is, from time to time notify our trade of our prices? No, sir.

Q. You do not. Have you found that your competitors do issue quotations?

A. Some of them do.

Q. And you do not follow that practice?

A. No, sir. I think it is a waste of time.

Q. Suppose you send a salesman to a destination point at which you do not have a customer and at which you did not have the quotation of one of your competitors, what price would your salesman be instructed to quote there?

A. Well, he would—if he did not know the price there himself he would communicate with us, and by "us" I mean the office, and ask us what he should quote. We would

figure a price, and in that fashion, or in that manner, rather, we would refer to the last known base at a competitor's plant. Now, if that is what you were trying to get me to say, I am perfectly willing to say that.

Q. I am not trying to get you to say a single sol-
31312 itary thing. You say just exactly what you want. You are under oath. All I want you to do is to answer my questions. I do not care what you say but I want to know the facts. If that is the fact it satisfies me.

I would like to have you illustrate a little on the reference you made to base in that answer.

A. Well, when a—

Q. Explain a little bit more fully, if you can.

A. When a change takes place, either up or down, as a sales manager of our company I analyze what it means. I attempt to determine whether it means the price in effect before the change which reflected a base at a mill or group of mills, whether that new price reflects a change at that group of mills, or another group of mills until—

Q. Now, you see— Excuse me.

A. —until I have determined as best I can what has taken place.

Q. Has it been your experience that changes in destination prices occur frequently which changes cannot be reflected to a change in the base point?

A. Not frequently; no, sir.

Q. Would you say that generally a change at a destination point indicates a change at some base point?

A. Usually; yes, sir.

Q. And except in the— Would you say that ex-
31313 cept in the so-called arbitrary zones under your Westchester and Long Island, that the only changes that have occurred at destination points in the sales territory in which you sell have been connected with a change in a base point price in the last two years, let's say?

A. Will you read that question, please?

(Question read.)

Q. Make it three years.

A. Well, when you say "have been connected with a base point changes" you mean the phraseology that I used referring to base point change?

Q. That is correct.

A. Now, wait a minute.

Go off the record a second.

Trial Examiner Norwood: Off the record.

(There was a discussion off the record.)

Trial Examiner Norwood: On the record.

A. I would say the major—the majority of them have reflected a base change.

By Mr. Paulson:

Q. Well, I went a little further. I wanted to know if you knew of any that did not reflect a change in the base.

A. You said three years?

Q. Yes, '37, '38, and '39.

A. I do not recall any that did not reflect a base change.

31314 Q. And how many base changes do you recall in that period?

A. I think four.

Q. Will you tell us what they were?

A. Our own at Thomaston, Me., the Allentown Portland at Conshohocken, and the Allentown Portland at Evansville. Now, I do not remember who started the other one, but it seems to me there was one other advance.

Trial Examiner Norwood: Have there been any recessions during that time?

The Witness: I beg your pardon?

Trial Examiner Norwood: Have there been any recessions in price since that time,—changes?

The Witness: Well, ours was a recession. Ours was a lowering of price at Thomaston, and the establishment of the Allentown Portland's prices reflected a lowering of base at both Conshohocken and Evansville.

By Mr. Paulson:

Q. That is four changes, you say, in three years. Does that correspond with your experience over the 20-year period as to frequency of changes?

A. Well, they have been a little more frequent than that. There may have been three-year periods when they were less, and I know of one period when there were a great many more than three.

Q. Yes, during the depression, that was during 1931 to 1933.

31315 A. Yes, that period in there.

Q. Is that described accurately as a period of price war in the cement industry, is it not?

A. That is all right by me.

Q. Then that has been your experience in the 20 years you have been in the business as to the frequency of price changes. You have come to expect that the price of cement at destination points will not change frequently?

A. No, sir; I have not come to expect that. I expect most anything in the cement business.

Q. Well, a change in a base-point price, a change at destination which reflects a change in base point, to use your language, is news, isn't it?

A. Yes, sir.

Q. And you have your salesmen watch continuously for quotations which indicate that such a change has been made?

A. Well, they are to get orders, and if there is any change they are soon told about it.

Q. But, your knowledge and experience has taught you that changes won't be made at destination points at random, but, instead, that changes will be made which reflect themselves in changes in basing-point price?

A. Not necessarily.

Q. Well—

A. Take your—

31316 Q. —that is generally true?

A. You refer to them here as arbitraries. We know what you are talking about; at least, I know what you are talking about, but they reflect no base point.

Q. Yes, but generally it is true that destination points are related to a basing point, isn't it? I think we have agreed on that.

A. Generally true; yes, sir, I said that.

Trial Examiner Norwood: I think he has already said that.

Mr. Paulson: I think we have agreed on that.

By Mr. Paulson:

Q. So that a matter of pricing of your product is not one of your daily considerations, is it or is it?

A. I do not change my prices daily, no.

Q. As a matter of fact, you don't give much of your office time to determining the price at which you will sell cement at, do you?

A. No, sir; I do not.

Q. You wait for your—you instruct your salesmen to

keep themselves posted as to quotations which reflect changes in base points, and then you follow?

A. I do not have to instruct them to do that. I do not instruct them to do that, no. That last piece, I did not think you were going to say that; I do not instruct
31317 them that way. I instruct them to go out and sell cement.

Q. But they do, in the course of their business?

A. They report any news that they think might be of any interest to me, and naturally a price change is news, as you stated it.

Trial Examiner Norwood: We understand it; that is part of their duty, is it not?

The Witness: They understand that it is their duty to keep their eye on the market; yes, sir. They do that naturally in their own self-protection. It is human nature for a man to do so, selling. The minute he thinks he is being undersold he will holler from the roof top.

By Mr. Paulson:

Q. Did it take you long to analyze the first group of quotations, or the group of quotations which were transmitted to you by your salesmen reflecting any change—

A. It does not take me over an hour.

Q. Wait a minute. —reflecting any change that there was a dual base about which you spoke on direct, I have forgotten the point.

A. New Jersey.

Q. Did it take you long?

A. No, it did not take me very long. That was simple because if you know your geography down around that area, Phillipsburg is on one side of the river, which is New
31318 Jersey, and Easton, Pa., is on the other side of the river, and there are several more instances, Trenton, and so forth. You apparently—it is not very clear to you just what we go through, but if you will let me explain it I think I can make it clear to you and you can understand it.

Q. I wish you would.

A. If I go in my office tomorrow morning at 9 o'clock, if there is a price change in the field, I will hear of it by 5 minutes past 9. The minute I hear it—we will say it is in, the first person to call me was from New Jersey somewhere. Immediately I will get in touch with my district manager in New Jersey and several clerks and say, "Call

up so and so, so and so, and so and so. It looks like something is doing. See what you can find out." They do it. They will come back with some information of one sort or another. We act from there on. If they come back with fifteen, "Yes, it is down here, it is down here $2.51 here, whatever it is, $2.61, $2.28 here; it was $2.38," and so forth and so on. It does not take long before you establish some sort of pattern. The same thing is true so far as the dual base, Easton on one side of the river and Philipsburg on the other, two big marketing centers. When I start checking, if we call somebody in Easton, maybe the General Builders there, or I don't recall the particular instance, and it is not—was not anything mysterious to me as to a cement man that we are stopped at the river.

31319 Q. I was wondering had you had experience with dual bases before.

A. Camden and Philadelphia, for instance, one on one side of the river and one on the other, you know, dealers in Camden, dealers in Philadelphia.

Q. Have you had experience with dual bases before?

A. I thin that is the first time I recall.

Q. I suppose your reading, your general information of cement matters throughout the country had given you information that they had existed other places?

A. You are right, that is right. I had forgotten that.

Q. Well, what use do you make of The Cement Institute books in analyzing prices, if any, analyzing quotations, if any?

A. We use them for that purpose.

Q. Well, explain it, I do not—explain, will you, how you use them for that purpose?

A. Well, a man that is handling—a man in the office that is handling customers' orders and shipments and making out quotations, he carries many of those things in his head. Now, he can tell you many of the freight rates to—

Q. You misunderstood that question. I said in analyzing the quotations you pick up.

A. Well, if I pick up a quotation, pick up a quotation of $2.31, we will say, f.o.b. cars at Brownsville, if the person making the analysis does not know the freight in his

31320 head he will refer to the freight rate book and subtract, perhaps, the Valley freight or the Hudson River freight, or Rockland freight from this point. He will do it in the first instance, he will do it in all of them.

Q. And when you subscribed to the Young service, did you use the Young service for that same purpose?

A. Well, I was not sure—I remember saying about the Young service. I do not remember whether we—I do not think we had the whole Young service. It seems to me there was a period in there when the Nazareth Traffic Bureau was going out of service and the Young Service was going in and take it over, and—

Q. You do not recall.

A. And we continued to use the book, and—

Q. Without a freight rate book, which is given to you and your competitors, it would be more difficult to analyze and find the base that is reflected by quotations, would it not?

A. Without a book of any kind, just to refer to the tariff?

Q. Yes.

A. It would be a whole lot more difficult.

31324 Q. Are all of your terms of sale like those of your competitors, to your knowledge?

A. Well, if they are not, I will match the best terms that are out.

Q. You testified on direct that The Cement Institute had nothing to do with fixing the prices of cement. Is that correct? Is that your testimony?

A. I think so; yes, sir,—as far as I know they have nothing to do with fixing the price of cement.

Q. Do your salesmen carry Cement Institute freight rate books?

A. Some of them do; not all of them.

Q. How do they use them?

31325 A. How do they use them?

Q. Yes.

A. Use them to determine the freight rate from our mill to a destination, if they don't already know it.

Q. What,—to make out bills-of-lading?

A. No, salesmen don't make up bills-of-lading.

Q. What does he care about the freight rate?

A. Well, we had a question here not long ago, you asked me how I determined the base reflected at a plant if there was such a reflection, and I told you that we subtracted freight—salesman may use the book for that purpose.

Q. Yes, and the other—

A. And in the reverse process, he may add freight.

Q. To a base to determine his delivered price?

A. That's right.

Trial Examiner Norwood: He uses it in checking a competing price that he finds out in the field?

The Witness: Yes, he might use it for that purpose; yes, sir. He might do it for checking one of our prices.

By Mr. Paulson:

Q. Do you consider that you made a fair statement, then, on direct when you said that The Cement Institute had nothing to do with the fixing of prices of cement?

A. Yes, sir; I certainly do.

Q. They issue the freight rate books, do they not?

31326 A. The Cement Institute publishes the freight rate books; yes, sir.

Q. And your salesmen use the freight rate books in quoting destination prices, do they not?

A. They may in some instances.

Q. Well, they do, don't they?

A. They do in some instances.

Q. Well, then, the Institute does have something to do with making of prices in the cement industry, does it not?

A. Well, if you can say that the paper manufacturer that manufactures the paper that is used in the book has something to do with naming the prices, I will go along and say "Yes," but I think it is pretty far fetched.

I have denied that The Cement Institute, as far as I know, has anything to do with the making of prices, and I don't think they have.

Q. To your knowledge, do your competitors quote prices identical with yours at all destinations at which you do business?

A. Well, if they did not, in my experience, they wouldn't get the business.

Q. Well, what is your experience?

A. Beg your pardon?

Q. What is your experinece? Do they or do they not quote identical prices?

A. My experience is the market is uniform most of the time.

31327 Q. All companies are in the same market, at the same price, at the same time?

A. Yes, sir.

Q. To your knowledge, do your competitors use the Institute freight rate books in calculating delivered prices?

A. Well, I don't know how they use them; I imagine they subscribe to them.

Q. You don't have any knowledge of that, then?

A. No, sir; I have not.

Q. Do you subscribe to them without knowing whether or not your competitors subscribe to them?

A. You bet your life.

Q. Would you continue to use them if you knew your competitors were not using them?

A. If I can continue to get freight rate books from the Institute for less money than what I could prepare my own freight rate books, I would continue to use freight rate books from the Institute irregardless of whether my competitors get a freight rate book or not.

Q. That is not quite a responsive answer, but I said—if you knew your competitors were not using freight rate books, would you use them—the Institute freight rate books—would you use them?

A. The fact that a competitor does or does not use a freight rate book has no bearing on whether I will use it or not.

31328 Q. You use it so as to be sure that you are in there at the prevailing market prices, do you not?

A. No, sir.

Q. In other words, you make your delivered prices independently of what your competitors make; is that true?

A. No, I don't make my prices independently of what my competitors—I do not make my prices independently of what my competitors make. If any competitor establishes a price in the market, I will meet it.

Q. That is, one of two things must obtain there, it seems to me. You either pick up the quotations in the field, and have nothing to do with freight rates or basing point, or you have something to do with freight rates and basing

31329 points and make your price at destination points by adding the freight rate to your basing point. Which is the case?

A. I pick up my competitor's quotations, if they are different than the prices which I am making, and naming from day to day. If I pick up competitors' quotations which are lower than mine, I must meet them or withdraw

from the market. If they are higher than mine, I can consider then whether I shall meet them, and go on.

Q. Now, you put a large "if" in there. Let me ask you,—it is your practice today, is it not, to quote destination prices by adding the freight rate that your take from The Cement Institute freight rate book to a basing point?

A. No, sir; it is not, and I have said that half a dozen times today.

Trial Examiner Norwood: Wouldn't you do that to some destination where the price had not been picked up, and you had f.o.b. prices all around in adjoining territory that you found related to a particular base?

The Witness: In that instance; yes, sir.

Trial Examiner Norwood: Yes.

Mr. Paulson: Yes.

By Mr. Paulson:

Q. You do that—

A. In certain instances.

Q. —in certain instances.

31330 A. I do what in certain instances?

Now, let me get that straight.

Q. Add the freight from the Freight Rate Institute book to the base point which you have discovered is applicable to points surrounding the destinations to which you wish to make a quotation.

A. If we have established to our own satisfaction that a series of new prices reflects a given base, we say to ourselves, "There is a new base at that point."

Now, does that answer your question?

Q. And you, in establishing prices at destination points, add the freight in the Freight Rate Institute book to that base as you have discovered?

A. If it is necessary for us to do so, we might do that, yes.

Q. Well, you do?

A. We don't do it in all instances, Mr. Paulson.

Q. No, I don't care whether you do it in all instances. I want to know whether you do it at all. Do you or don't you?

A. Yes, in certain instances, we do.

Q. Now, to your knowledge, do your competitors use the Freight Rate Institute books for the same purpose?

A. I don't know.

Q. You don't know that?

A. I don't know that, sir.

31331 Q. You have been in the busines 20 years, and you don't know whether—

A. I don't know what my competitors do, I can't tell you what competitors subscribe to Cement Institute books, or what competitors don't, from my own knowledge.

Q. Well, the record in this case will show which do and which do not.

A. Well, maybe it will.

Q. And if I should tell you that the record shows that your competitors do price, at some destination points, by adding freight taken from a Freight Rate Institute book, to the basing point, would you say that The Cement Institute has nothing to do with the fixing of prices, with the knowledge that it is the one—that it is the one that uses the freight rate book?

A. I would most emphatically, sir.

Q. All right.

You said you have no instructions from the Institute in regard to your policies or prices,—is that correct?

A. Yes, sir; that's correct.

Q. Did you continue to be a member of the Institute after the Schechter decision and until December of 1936?

A. Will you read that question, please?

Trial Examiner Norwood: Read it.

(Last question read.)

A. I am still a member of the Institute.

31332 Q. I see.

Did you ever receive a communication from a Trade Practice Committee of The Cement Institute?

A. Yes, sir.

Q. With what did that communication deal, please?

A. Why, I don't remember; it seems to me we received a lot of communications from the Trade Practice Committee.

Q. With what did they deal?

A. Beg pardon?

Q. With what did they deal, please?

A. You will have to tell me which one you are referring to.

Q. Any one.

A. Well, pick out one for me. I don't know. I don't

remember all the letters we may have gotten from the Trade Practice Committee, Mr. Paulson.

Q. Well, I do not, either, so I am afraid that you are the one that is going to have to tell me which you received.

A. You asked me if we received some. I told you that I thought probably we did. Yes, we did, but what they said, I don't remember, I haven't any idea.

Q. You don't remember what any of them said?

A. That's right.

Q. Then you said also on direct, I believe, that you had a one-price policy, did you say that?

A. I think so; yes, sir.

31333 Q. Your mill is at what point in Maine?

A. Thomaston.

31334 Q. I will ask you if you do have any price policy at all? Do you think you do?

A. I think we can accurately describe our policy as a one-price policy.

Q. You do not quote prices?

A. Beg pardon?

Q. You do not quote prices, you say?

A. I say I think we can accurately describe our policy as a one-price policy.

Q. But I want to find out whether you can accurately describe it as a one-price policy; you do not quote prices, do you?

A. I think we quote prices many times a day.

Q. You do not have the same delivered price at any two destination points, it is rare that you do?

A. Beg pardon?

Q. It is rare that you have the same destination price at any two points, is it not?

A. Oh, no.

31335 Q. Well, you have—it is generally true that you have—

A. Our price from Somerville, N. J., to New York along the Jersey Central Railroad is identical at every single town, and there must be 25 stations.

Q. It is generally true you have a price at each destination point?

A. It is generally true we have a price at each destination point at which we seek business; yes, sir.

Q. In that respect you do not have a one-price policy, do you?

A. What do you mean by "a one-price policy"? I guess we are talking a different language.

Q. I am trying to find out what you mean.

A. What I mean by a one-price policy, I think I explained on direct examination.

Q. What is it?

A. We name the same price to the same class of buyer in the same market.

Q. Oh, I see. All right.

You say you do name a price, though, in that market?

A. Certainly we name a price.

Q. You do not stick to it very long, do you?

A. What do you mean we do not stick to it very long?

Q. In event that you sold a carload of cement at $1.70, say, to a destination point, and there was a price re-
31336 duction that afternoon after you had made out your bill-of-lading and shipped your car, your customer would get that for less than $1.70, wouldn't he?

A. Yes, sir. It would amount to less.

Q. Well, did you have a price policy in that market, then, or didn't you?

A. We got a price until we change—we have a price of $1.70, and if it went down to $1.65, we change it to $1.65.

Q. No doubt at that destination point, when shipping to that destination point, you would make out a bill-of-lading, wouldn't you?

A. Yes, sir; we would have to, before the railroad would accept the car.

Q. And on that bill-of-lading you would place the freight rate from your mill to that destination point?

A. Yes, sir; we would.

Q. And—

A. And the name of the consignee and delivering carrier, the route, and what the car contained, and the car number.

Q. But when the customer received it he would—or went to take delivery from the railroad, they would hand him a freight bill, would they not?

A. No, they do not hand him a freight bill.

Q. The railroad would hand him a freight bill?

A. No, sir.

31337 Q. Where does he get notice to pay the railroad some freight?

A. He does not pay the railroad any freight.

Q. But I am talking about before you prepaid, I assume you had reference—I am talking about the period up to 1940. Can you answer the question now?

Q. The railroad would hand the customer a freight bill?

A. Yes, sir.

Q. And that freight bill might carry a different freight from the one that you put on your bill-of-lading?

A. I do not know; unless there was an error of some kind, I do not think it would.

Q. Well, if there was an error it would carry a different amount for freight?

A. If there was an error?

Q. Yes.

A. Why, sure. Anything could happen.

Q. What is that?

A. Anything would happen if it is an error.

Q. If there was an error you would get a different figure from what you would have netted out of that shipment?

A. Wait a minute. What kind of an error are you talking about, Mr. Paulson?

Q. If there had been an error in the freight rate
31338 that you use on your bill-of-lading, your mill net would be different.

A. Our mill net would be the same. We have a mill net that we say to the customer, talking before 1940, a car of cement, less so much freight, dollars and cents.

Q. Oh, is that the way you billed your customer?

A. Certainly.

Q. Do you put the amount of freight in dollars and cents on your invoice to the customer?

A. Yes, sir.

Q. And he pays that?

A. If the freight is not prepaid, it is a collect charge, he pays the freight to the railroad.

Q. That is what I thought.

A. And when he pays our bill he does not pay us the freight. We have already subtracted the freight for him. He does not owe us the freight.

Q. But when he—in the event of an error in the rate, supposing you had put on $40 freight on that car to that destination point, and the railroad decided that it should be $45 freight. Your mill net would be reduced by $5 on that car, would it not?

A. No. You have overlooked a step. The customer has got to notify us that he paid $45 freight, and we only allowed him $40 freight. If he does, and we find that the rate was incorrectly figured by us, we correct our mistake.

If the railroad made a mistake, we tell the customer
31339 to go back to the railroad and pay the proper amount.

Q. Well, including, as you did, up to 1940, including the freight in your delivered price, you never knew when you made the sale what mill-net you were going to receive?

A. He is not interested in what mill net we receive.

Q. No. He is not. You never knew definitely what mill net you would receive, did you?

A. Why, yes, we know what we are going to receive.

Q. You were not positive of it, were you?

A. I beg pardon?

Q. You were not positive of it, were you?

A. Yes. We are on the job. We know what freight rates are just as well as the railroad does.

Q. And if you made an error in your freight rate—

A. We do not make errors.

Q. In the event you made an error.

A. Oh, there might be an isolated instance out of 20,000 shipments in a year where we have made a mistake in figuring the freight, and if we made a mistake, why, we would correct it.

Q. How many trade associations are you familiar with in the cement industry, in your experience in that industry?

A. How many trade associations?

Q. Yes, sir.

31340 A. I do not know of any trade associations in the cement industry.

Q. Well, in 1920 was there a trade association in the cement industry?

A. I do not recall of any. Was there?

Q. Well, when was—what was the first cooperative action you heard of in the cement industry when you came in?

A. I do not know as I ever heard of any cooperative—the Portland Cement Association, do you call that a cooperative?

Q. Yes. That is right.

A. The Portland Cement Association.

Q. What came next?

A. We still have the Portland Cement Association.

Q. Yes, you have that; and what else happened, in your experience, with regard to the organization of trade associations?

A. I do not know of any other association.

Q. Are you familiar with the Cement Manufacturers Protective Association?

A. Yes, vaguely.

Q. Arent's you a member of it?

A. Am I a member?

Q. Your company.

A. The company was.

Q. Well, any others, in your experience?

A. Do you call The Cement Institute a trade association?

31341 Q. Yes, sir.

A. We are members of The Cement Institute.

Q. Any others?

A. I do not recall any others.

Q. Are you familiar with the activities of the Cement Manufacturers Protective Association, of which you were a member?

A. No, I do not know very much about that.

Q. Are you an officer of the company?

A. No, sir. That is, not an officer of the company when we were members of the Cement Manufacturers Protective Association.

Q. You never served on any committees?

A. No, sir.

Q. You do not know what their influence in the trade was?

A. Don't know anything about them.

Q. You do not know whether or not it was the practice of the various cement trade associations, to which your company has been a member, to recommend trade practices from time to time?

A. No, I do not. I do not. I am not trying to avoid your question. I do not think I understand it. I never, up to now, referred to the Portland Cement Association, in my own mind, as a trade association. I suppose it is in a broad sense of the word. I do not quite understand your question.

Q. Well, have you ever had recommended to you a

trade practice for use in the conduct of your business?

31342 A. Would you call the Code of the N. R. A. a trade practice?

Q. Yes.

A. Well, we were—we adhered to the Code.

Q. Well, did you ever have recommended to you any other—by any other agency than the Code Authority any trade practices for use in the conduct of your business?

A. Not that I know of, sir.

Q. Did The Cement Institute ever recommend to you the use of a contract form which carried the provision that conversion in transit should be disallowed?

A. That what should be disallowed?

Q. Diversion in transit should be disallowed.

A. Not that I recall of.

Q. You do not recall The Cement Institute had a committee which considered the revision of the standard sales contract?

A. At the time of the N. R. A.?

Q. Well, do you recall?

A. Well, it seems to me—I have not read the Code in a long, long time, but it seems to me the Code had provisions in it in connection with diversions, and I believe the Code prescribed a form for contract, did it not?

Q. Do your contracts carry provisions disallowing diversion of shipments in transit?

A. We have a diversion clause in the contract. Exactly what it says, I do not know.

31343 Q. How did it get into your contract; that is, the origin of it?

A. Well, now, I do not remember. I imagine today's contract certainly—if it is in the Code we probably got it from that source.

Q. You told us about the origin of your practice to allow five days to customers when prices were reduced. Can you tell us the origin of your practice to sell exclusively at delivered prices?

A. The origin to sell exclusively at delivered prices?

Q. Yes.

A. Well, we have sold at delivered prices ever since I have been with the business with the exceptions that I have enumerated before. I would not say that we now sell exclusively at delivered prices.

Q. Can you tell me the origin of your practice to refuse to sell f. o. b. a mill except to railroads?

A. The origin of that practice; no, sir; I cannot. It has been the policy of the company ever since I have been connected with them.

Q. Can you tell the origin of your practice to discontinue and disallow transportation of cement by truck?

31344 A. I cannot recall the year. I remember—I think it was the Lehigh Portland Cement Company announced that it had closed its platform to trucking, and we adopted a similar policy ourselves. We were mighty glad to get rid of it.

Q. Are you interested in stabilizing prices in

31345 cement markets?

A. I am interested in making positive that my price is competitive, if that is what you mean by stabilizing prices in the cement market.

Q. Well, do you favor fluctuating prices at destination points, or stabilized prices at destination points?

A. Well, may I ask you, Mr. Paulson, before I answer your question, what do you consider takes place today?

By Mr. Paulson:

Q. Well, I am afraid you will have to answer the question, if you can.

Trial Examiner Norwood: Answer the question; don't ask any.

The Witness: I cannot answer the question. It does not make sense to me, Your Honor.

By Mr. Paulson:

Q. Would you like to see prices fluctuate more

31346 than they do at destination points?

A. I would like to see us get more money for our cement today, but it depends on how the fluctuations that you refer to take place, what they amount to, and which way they fluctuate. What do you mean by fluctuating?

By Mr. Paulson:

Q. Well, I was trying to find out whether or not you thought the practice which you have found to exist generally; namely, that practice on the part of the cement manufacturers of selling at delivered prices is conducive to stabilized prices.

A. Why, I do not think it is necessarily conducive to stabilized prices.

31347 Q. Do you think f. o. b. mill selling would be more conducive to stabilized prices in the cement industry?

A. Well, Mr. Paulson, will you please tell me what you mean by f. o. b. mill selling? Now—or per-

31348 haps I can ask you a question. Do you mean every mill in the industry sells f. o. b. its mill?

By Mr. Paulson:

Q. Generally.

A. And free, wide, and open and can name any price at their mill from day to day, or week to week or month to month?

Q. Yes, sir.

A. Now, you ask me if I favor such a plan?

Q. No, I asked you, do you think that that general practice would be more conducive to stabilized prices than the present one?

A. I think it would be conducive to nothing more than chaos on the part of the cement buyer.

Q. Is it one of the reasons you refuse to abandon the practice of selling at delivered prices, that you want to stabilize markets?

A. I want a stabilized market—now, let me finish. By a stabilized market I want my customers to know what my cement is going to cost them.

Trial Examiner Norwood: Now, you are not answering the question there.

Read the question.

(Question read.)

The Witness: Oh, I beg your pardon.

A. No, it is not.

31349 By Mr. Paulson:

Q. You think that you could accomplish your purposes or stabilizing markets to better advantage by selling f. o. b. mill?

A. I did not say it was my purpose to stabilize markets, to begin with.

Q. I thought you said you were interested.

A. Now, you are asking me whether, what I think is best for our company. I will say that the policy we pur-

sue. If we could find one I thought was better I would put it in effect tomorrow.

Q. But you do have a certain loyalty towards the delivered-price system?

A. I have no loyalty towards the delivered-price system except in so far as I feel it is to the advantage of the owners of the company I work for.

Q. Why is it to the advantage of the owners of the company that you work for?

A. Because the people that I do business with prefer it. Now, to ask me to go out and try to sell a plan to a group of cement buyers that they do not want, and are not, in my opinion, going to accept it, it, to me, invites nothing more nor less than the loss of your trade.

Mr. Paulson: Your Honor, I wanted to move to strike all the testimony of this witness dealing with costs
31350 and profits, because we gave notice to Respondents' Counsel to produce basic data for use in cross-examination, and it was not produced. We did not have the use of it in cross-examination; consequently, we had no opportunity to test the accuracy of the witness' statement on direct with regard to costs and profits. It is prejudicial if it remains in the record.

Trial Examiner Norwood: Well, the Counsel for the Respondent has stated that he expects to produce abundant particular cost and profit data. Now, I wish—

Mr. Leisure: Not under that notice to produce, however; not performing under that. I do not want any misunderstanding on the record.

Trial Examiner Norwood: In other words, you state now that you will not produce or give access to the data on which those statements—

Mr. Leisure: I do not see that there is any occasion for me to state anything on that notice to produce. It is obvious we cannot get it here this afternoon when the notice to produce was made this morning to get books from Maine down here.

Trial Examiner Norwood: That is just what I was trying to get at.

I said that, that Counsel for the Respondent had stated that he would produce abundant costs and profits
31351 data, and you have notified him to produce this particular data on costs and profits, and, as he indicates now, that he should have time—

Mr. Leisure: Well, now, I don't want—

Trial Examiner Norwood: —to produce that—

Mr. Leisure: —any confusion on the record. I don't know whether Your Honor is saying that deliberately or not.

Trial Examiner Norwood: That is what I want to know.

Mr. Leisure: You have twice used the word "produce" and Counsel have used the word "produce," and I haven't said anything about producing anything.

Trial Examiner Norwood: Yes.

Mr. Leisure: I have said what we intended to prove before this case is over, and I said in connection with that it has nothing to do with this witness' testimony.

Mr. Paulson: Well, I think that—

Trial Examiner Norwood: You said something about not having had time to produce this particular data.

Mr. Leisure: I said I should think that would be obvious to anyone—

Trial Examiner Norwood: Yes.

Mr. Leisure: —that when we are given notice in the morning to in the afternoon produce things from Maine, that we could not have them here at 3 o'clock in the 31352 afternoon.

Trial Examiner Norwood: My proposition was to reserve the ruling on that—

Mr. Leisure: Well, it sounded like—

Trial Examiner Norwood: —until you have had sufficient time to produce them.

Mr. Leisure: No, I am not asking for any time; I am not called upon to make any response on a proposition to produce, and I am not making any.

Mr. MacIntyre: Well, if Your Honor please, in the light of the refusal to make response—

Trial Examiner Norwood: Yes.

Mr. MacIntyre: —on a notice to produce which was made here this morning, we ask one of two things at this time,—that is, that we have the privilege of further cross-examination—deferred cross-examination of this witness—

Trial Examiner Norwood: Yes.

Mr. MacIntyre: —at such time as Mr. Leisure has had the time to get this basic data from the offices of this company in New York City, where the offices are located, and, failing to do that that the testimony of the witness on the question of costs that was given here this morning be stricken from the record, or that representatives of the

Federal Trade Commission be given open, full, and
31353 complete access to the books, so that we may determine the truth and the accuracy of the statements that have been given by the witness here, and we want to hear from Counsel on that point, the last point, right now, as to whether or not he, as Counsel for this witness, is going to refuse the access to those books except by order of court.

Trial Examiner Norwood: Well, now, I agree—at least to some extent—to Counsel's position about that. One of those suggested avenues of procedure will be adopted. In the meantime I am reserving the decision on the motion to strike.

Mr. Brick: I would like to point out to Your Honor that in connection with any matters which we covered through this witness relating to losses—I don't think we had any occasion to talk about profits—we did talk about losses.

Trial Examiner Norwood: Yes.

Mr. Brick: And I recall at one particular point the witness stated that a price advance was partially brought about because of losses that the company had been suffering, but that's something to which he testified of his own knowledge and certainly who would know better than this witness whether or not at any particular time his company was operating at a loss.

31354 Trial Examiner Norwood: Yes, I know, but don't you think that—

Mr. Brick: And what right has Mr. MacIntyre to make any claim or demand that he should be permitted to go to the office of the company and browse through their books? I do not follow that.

Trial Examiner Norwood: The same right that the Respondents had to demand, very loudly and insistently, and repeatedly, that papers be produced here in large quantities for the same purpose.

Mr. Paulson: And they were produced.

Mr. Brick: First of all, they were not produced; second, the witness on the stand did not, of his own knowledge, know the situation.

Trial Examiner Norwood: And such papers were produced as could be produced under that, a considerable amount of papers were produced on that.

Mr. Brick: But it was secondary evidence, Your Honor

please. The witness on the stand in those cases did not know of his own knowledge the facts about which he was testifying.

Here is a different situation. Here is a man who is a vice-president of his company, and he knows whether they were operating at a loss,—any man knows that.

Mr. MacIntyre: The record is clear on that.

31355 Mr. Brick: It only requires reference to his profit-and-loss statement for the year.

Mr. Paulson: No further cross-examination.

Trial Examiner Norwood: Do Counsel wish to cross-examine him now on that statement about his losses, and find out how much he knows, and how many figures he has gone into on the question?

Mr. Paulson: Well, it seems to me to be apparent that the witness would not know the figures—

Trial Examiner Norwood: Can you give the exact figures of the losses?

The Witness: No, I can't tell you exactly what we lost in a particular year from memory.

Trial Examiner Norwood: Do you know the causes of the losses?

The Witness: Low price of cement, I guess; lack of—

Trial Examiner Norwood: Do you know the salaries that were paid your president at that time?

Mr. Brick: I object to that question, Your Honor.

Trial Examiner Norwood: The objection is overruled. Answer the question.

The Witness: Do I know the salary that was paid to the president—

Trial Examiner Norwood: Yes.

The Witness: At that time?

31356 Trial Examiner Norwood: Yes.

The Witness: I have a pretty good idea.

Trial Examiner Norwood: Well, what was it?

The Witness: Is it necessary for me to answer that question, sir?

Trial Examiner Norwood: I think so.

The Witness: Can I ask Counsel whether he thinks so?

Trial Examiner Norwood: Yes.

The Witness: (Addressing Mr. Brick.) Shall I answer that question, Counsel?

Mr. Brick: Well, I have no objection, personally, Your

Honor, to the witness answering the question; but it seems to me to be taking a little bit unfair advantage of what might be an unfortunate situation. It is prompted by the desire of Counsel for the Commission looking into books, which they probably have examined from time to time in the past.

Now, it seems to me that it is a little unfair to the vice-president of the company to ask him what was being paid his president merely because he has stated that the company was operating at a loss. How can it be at all probative?

Trial Examiner Norwood: I think that that enters into this matter of costs and losses, and what the losses were due to, and if you are going into costs, you are going 31357 into all of it.

Mr. Bricker: Of course you—

Trial Examiner Norwood: Now, there is a motion on practically—if you want to go into that matter, I think—well, I shall look up the other motion and rule on it. I will defer the ruling on both of those.

Do you want to ask him any further questions on that matter?

Mr. Paulson: No, I have no further questions unless Your Honor should rule—

Trial Examiner Norwood: I understand.

Mr. Paulson: —that the motion is disallowed, in which event there would appear in the record some statements of testimony by the witness, and we should not have had an opportunity to cross-examine on it.

I think that your ruling should be made at this time that that will be stricken unless Respondents' Counsel produce the basic data and consent that it be used in the form that we want it, and recall the witness.

Trial Examiner Norwood: I have indicated that attitude.

31360 Washington, D. C.
January 25, 1940.

31361 CHARLES F. LEWIS, being called as a witness for the Respondents and being first duly sworn, testified as follows:

Direct Examination by Mr. Werle:

31362 I am the manager and assistant treasurer of the Volunteer Portland Cement Company. I have been manager of the company since it started operations in 1928. I am in charge of all operating and production matters, various special work that comes up, and in some degree participate in the sales and other matters of the company. I started work at cement plants during the summer vacation in 1899.

31364 Q. Now, there is some testimony in the record that you were retained as consulting engineer for the United States Department in connection with the Puerto Rican plant; is that correct?

A. Yes, sir.

Q. Will you explain briefly what part you took in connection with the construction of that plant?

31367 A. Well, I prepared general plans and specifications for the plant, outlined the principal machinery, and of course the layout of the plant proper, and the performance expected from the machinery. Then, further, I worked with Major Eckel in selecting the location, general location, and for the Puerto Rico Reconstruction Administration located the plant in detail and the quarries, gave them advice on operating personnel and operating methods, and the utilization of the raw materials.

I visited Puerto Rico three times in connection with this work, and went over matters on the ground.

Does that answer your question, Mr. Werle?

By Mr. Werle:

Q. Yes, I think so.

Just to shorten it, were you the consulting engineer in charge of that construction?

A. No, I was not strictly a consulting engineer; rather,

a consultant. I had no powers to decide anything. I simply made recommendations.

Q. Were your services voluntary or were you compensated?

A. I was compensated for them.

Q. Now, there is testimony in the record that the cost of constructing that Puerto Rico mill was estimated in 1935 as $1.80 or $1.90 per barrel; is that correct?

A. I do not know what the estimates were in 1934
31368 or 1935. That was prior to my connection with the project, but I made certain estimates after I was engaged.

Q. Were those estimates used by the Puerto Rican Administration, or whatever the body was?

A. They were for a period of several months until, oh the fall of 1936.

Q. Now, what was your first estimate on the cost of that plant?

Mr. Paulson: I object. This is not material to the issue in this case. I can see now what the line of testimony is, and it is simply that the Respondents are seeking to illustrate through the experiment that the Government made in a mill down in Puerto Rico by facts and figures regarding that mill that the cost of building a cement mill is such and such. We never introduced any testimony in regard to the Puerto Rican mill there to show the costs of building a mill; we may have asked Major Eccles a few questions to show that he had had some experience; in other words, to qualify him as an expert, but we did not put in issue anything about the costs of building the mill in Puerto Rico.

Trial Examiner Norwood: No, but you put in, at length and exhaustively, figures showing the cost at which the Government could purchase cement on the T. V. A. projects, didn't you?

31369 Mr. Paulson: Yes.

Trial Examiner Norwood: And here is another project.

Mr. Paulson: But what has that—how can that—I do not follow Your Honor there. I cannot see how some other project that the Government might be engaging in would cast any light on the price-costs of a certain project on the T. V. A.

Trial Examiner Norwood: Now, why was that evidence adduced?

Mr. Paulson: To lay the groundwork, and to qualify Major Eccles as an expert. We asked him about his connections with the building of the Puerto Rico plant. We had no concern in this case—the complaint takes no cognizance of the plant at Puerto Rico, and there isn't any issue in this case that the building of a plan at Puerto Rico would be related to or material to.

They are seeking, again, to drag in an issue they have picked out of a Government plant at Puerto Rico. We all know, and we have reason to believe, it has not been so successful. There has been something wrong about the building of that plant over there. If that were received in evidence regarding that plant—and that evidence were received in this record—it would mean that we would have to explain and explain some more.

31370 Trial Examiner Norwood: I do not see how even if costs were relevant, how costs of a plant in Puerto Rico would apply to any conditions here that are involved in this case, because they are dealing with the situation in the United States.

Mr. Werle: Well, I have just two things to say on that, if Your Honor please: In the first place, this qualification of Major Eccles as an expert because of his T. V. A. experience was an afterthought that was not brought out as part of his qualifications at all, it came in later in his statement—

Mr. Paulson: That is a misstatement. I said his experience on the Puerto Rico plant.

Trial Examiner Norwood: Yes.

Mr. Paulson: We put in the testimony about the feasibility of the T. V. A. project, we put that in.

Mr. Werle: If I said "T. V. A.," I misspoke myself; I meant Puerto Rico, Mr. Paulson; I am sorry.

But, either way, it is the same,—this issue was raised by the Government, they put in evidence about it; they put in that the cost of building that plant was $3 a barrel. I expect,—and we have no way of knowing what the Government's purpose is,—but I expect they will use it in connection with some of the charges in this complaint, to

31371 allege now, the cost at the mill was $1.80 a barrel and then they will use that as an argument to show that you could do it for less,—if you could build one in the

Atlantic Ocean for that price you could build one here for a lot less, and then tie in with Dr. Morgan's testimony that one of these mills could ship cement at $1.25 and make a lot of money out of it.

I do not know how we can meet that, except to have the man here who was a consultant on that project and can tell us what the facts are.

It is not going to be a long drawn-out story; we will cover it as quickly as we can.

Mr. MacIntyre: On that point, Your Honor, we now assure Counsel for the Respondents that—and will stipulate with them at this time—that we will take no figures that were secured through the testimony of Major Eccles, or otherwise, concerning costs of producing a cement mill, or producing cement in the mill in Puerto Rico for the purpose of showing at what costs cement mills could be built, or at what prices cement could be produced in the United States.

It seems to me that that meets his argument.

Trial Examiner Norwood: I think that the objection should be sustained to that question, and to that line of testimony

Mr. Werle: Well, I would like to make an offer of proof on that, Judge.

31372 Trial Examiner Norwood: Yes.

Mr. Werle: We offer to prove, through this witness, that the original estimate which this witness made of the cost of that plant was $848,242 plus $55,000 freight on materials, or a total of $903,242.

Trial Examiner Norwood: Yes.

Mr. Werle: And that in terms of per-barrel cost that would be $2.57 per barrel on the basis of a 360,000-barrel plant.

Trial Examiner Norwood: Proceed.

Mr. Smith: $2.51.

Mr. Werle: I think, Judge, that I have one or two more questions, to carry that a little further, and I assume Your Honor is not inclined to take that,—and that is a matter of extra expenses, and I would like to go a little further on my offer of proof.

Trial Examiner Norwood: Go ahead.

Mr. Werle: Covering the information that I think we will develop on that.

Trial Examiner Norwood: Go ahead.

Mr. Werle: That this cost estimate did not include several important items, which were land, the actual value of which, and the actual cost of which was $35,000; a main railroad spur, actual cost $23,000; a substation, actual cost $25,000; and organization cost which was estimated at $40,000.

31373 Furthermore, that that estimate did not include any working capital, and that the total over-all original estimated cost, including those items, would have been $2.85 per barrel.

Trial Examiner Norwood: Yes.

Mr. Werle: That, furthermore, it included no profit for the general contractor, and certain other miscellaneous items of cost.

Trial Examiner Norwood: Proceed.

Counsel has an exception to that entire line.

By Mr. Werle:

Q. Major Lewis, did you continue as consultant during the entire period of construction of that mill?

A. Yes, as my contract expired in the summer of 1938, but I continued dealing with them, writing letters and giving advice until about the last of March, 1939.

Mr. Werle: Then, Your Honor, in view of your ruling, and having that foundation testimony for the witness, I offer to prove through this witness that the final total construction cost per barrel of that mill was between $3.50 and $4.00 per barrel.

31378 Q. Major Lewis will you tell us from your experience what are the factors which need to be taken into consideration in the location of a cement plant?

Mr. MacIntyre: I object. It is irrelevant and immaterial.

Trial Examiner Norwood: The objection is overruled.

A. First, of course, an adequate supply of good raw materials, principally limestone and shale; secondly, I would say a reasonably good local market and reasonably good access to adjacent markets.

31379 The Witness: Will you tell me where I left off?

(Answer read.)

A. Adequate supplies of labor, fuel, power, and, incidentally, water, at reasonable costs.

By Mr. Werle:

Q. Now, I understand that you have given some study to the locations, and existing conditions, of cement
31380 plants throughout the East; is that correct?

A. That is right. I studied that more or less for a number of years.

Q. And what has been your experience as the result of having studied that as to whether or not there are sites available which satisfy the requirements which you mentioned?

A. There are no sites which I know of which satisfy in all particulars, or in a sufficient number of particulars.

The Volunteer mill is located just outside of Knoxville, Tennessee. The raw materials which are available at that location are marble which is a pure form of limestone for the principal material and shale for the secondary. The materials that must be purchased are gypsum and some silica sand, used largely in making the special cements for TVA. We also buy slag which is high in iron oxide from the Tennessee Copper Company for making TVA cement.

We buy gypsum from Saltville, Virginia, which I imagine is 200 miles from Knoxville; we buy Tennessee River sand in Knoxville; we buy the iron slag from Copper Hill,
31381 Tennessee, which is a little over a hundred miles from Knoxville. Some of the coal used at the mill is obtained within 30 miles of the mill and the rest is obtained as far as 150 miles in southeast Kentucky.

An investigation and study to find out what supply of raw materials is available at the site of company's plant was made with some care. In our present quarry opening we have stone available for another thirty years. We have elsewhere on the property limestone and marble adequate for, I believe, at least 100 years. Then the shale which is a minor ingredient is in proportion.

31382 Volunteer is not and never has been associated or affiliated in any way with any other cement manufacturing company. No other cement manufacturing company owns any stock in Volunteer. None of the directors or officers of Volunteer is a director or officer of any other cement producing company.

Q. Now, will you tell us, Major, the locations and distances from the Volunteer plant of your principal competitors?

A. The closest plant is the Kingsport plant of the Penn-

Dixie Company, approximately 90 miles; the next closest is the Signal Mountain plant at Chattanooga, about 115 miles; next, the Richard City plant of the Penn-Dixie Company, probably 140 miles; the plant of the Cumberland Portland Cement Company, at Cowan, Tenn., probably 160 or 170 miles; the plant of the Hermitage Company, at Nashville, approximately 200 miles. Then in Birmingham,
31383 about 275 miles away, there are three plants, Alpha, Lehigh, and Lone Star. Just outside of Birmingham is the plant of the Universal Atlas Cement Company. A little further out still, at Ragland, Ala., is the plant of the National Cement Company; to the north of us, north and west, the plant of the Louisville Cement Company, at Speeds, Ind.; the plant of the Kosmos Company, a little west of Louisville, at Kosmosdale, Ky.; on the Ohio River, the Superior plant near Portsmouth, and the Alpha plant at Ironton, the Green Bag plant, the Green Bag Company's plant, I believe, at Canova, W. Va. In Virginia, probably 400 miles, 350 or 400 miles from Knoxville, a plant of the Lehigh Company, and then over on the eastern seaboard, at Norfolk, Va., is the plant of the Lone Star Company.

Q. Does that cover them all?

A. That goes around the compass. No, I have forgotten the plant of the Southern States Cement Company, at Rockmore, Ga., that is about 150 miles, I judge. Then the plant of the Penn-Dixie Company at Perry, Ga., probably 300 miles southeast.

Q. Is that commonly referred to as Clinchfield?

A. Clinchfield plant; yes, sir.

31386 Q. Have you personally made any attempt to find out what percent of your annual output, on an average, goes into the City of Knoxville, Major Lewis?

A. Yes, I have kept records of that, for yearly shipments, for several years.

Q. What percentage is that, on an average?

31387 A. Oh, roughly, about 10 percent.

Q. Have you made any attempt to find out what percentage of the Knoxville business, on an average, your company gets?

A. In a general way only. We have no accurate way of determining it, but I have been quite curious about it, and checked it as closely as I could.

Q. What was the result of that check?

A. I think we get—I believe we get at least two-thirds,

and from there on up, of the business in Knoxville today.

31388 The witness identified Resp. Ex. 2187 as a map showing the Eastern and Southeastern portion of the United States on which he has shown in brown ink, Volunteer's freight advantage territory, and freight par. In green ink witness has outlined roughly the area in which the company endeavors to sell cement. In addition, there is shown a series of concentric circles with Knoxville as a center, at 10 miles, 25, 50, 75, 100, 150 and 200 miles' radius from Knoxville. The interior of the first circle has been marked with a Roman figure I, and the succeeding intervals with Roman figures up to VII. The area outside the 200 miles radius has been marked with Roman numeral VIII and he has considered these as zones. He has also shown by small heavy circles the location of the various competitive plants surrounding Knoxville which he referred to in his testimony a while ago.

Examination by Trial Examiner Norwood.

31389 The various zones represent various distances or belts of distances from Volunteer's plant.

The witness identified Resp. Ex. 2188 as being the key to the map describing the various areas indicated and showing the basis on which the par freight contour was arrived at by these towns and it also explains the zones that he referred to a moment ago. He prepared these exhibits personally.

31396 The witness identified Resp. Ex. 2189-A to E as a tabulation of quantities and destinations for the year 1938 showing the shipments Volunteer made into its freight par or freight advantage territory during that year. The year 1938 was selected after taking the distribution of the company's cement over a period of years, as being probably as close as he could arrive at an average distribution of their cement into the various states. It could not be exact, however. The information appearing on that tabulation was taken from the daily ship-
31397 ping reports which they make up at their plant for 1938. The tabulation shows the total shipments of the company for 1938 at the bottom of page E. He prepared this particular tabulation.

32399 (RESP. EX. 2189-A to 2189-E was offered and received in evidence.)

31403 The capacity of Volunteer cement mill is 1,125,000 barrels per year. That figure is determined by
31404 operating records over periods shorter than a year which we can extend to produce a figure for the entire year. I determine the rate of operation of my plant. The capacity of a cement plant, to my mind, is always based on the capacity to produce clinker; the grinding facilities are usually provided in excess of the clinker producing equipment. The daily and monthly productions of clinker are the actual operating factors that gave me the figure of 1,125,000 barrels. This is based on actual operating results. The rate of operation since 1929 has varied quite a little from year to year. The rate of operation since 1933 has varied considerably. In 1933 we ran at half capacity only part of the year; in 1934 we ran at half capacity, I think, for almost the entire year; in 1935 we ran at a higher rate of output. I think we ran about one kiln and one-half, if I can put it that way. It has run along at about that level, one kiln for the entire year, and the other kiln three or four months during the
31405 busy season since that time. Since then, the company has been running at more than half capacity.

Q. I think that the record shows that your company receives the statistical service of The Cement Institute, and do they come to your attention, the statistics?

A. Only occasionally.

Q. Will you state what use you make of them?

A. I make no use of them whatever; I sometimes glance at them, and I sometimes don't.

Q. Has Mr. Mallory, or any formulas of Mr. Mallory's, ever had anything to do with your determination of your plant capacity?

A. No, sir.

Q. Have the statistics furnished by The Cement Institute ever been used by your company to limit or curtail production, stocks, or shipments?

A. Not in any way.

Q. You would know if they had been, would you not, Major?

A. Unquestionably.

31412 By Mr. Werle:

Q. Now, as to all of the characteristics of cement as they have changed, as you have already told us, I understood you to say that it required finer grinding,—has that finer grinding had any effect on cost?

Mr. MacIntyre: Objected to; irrelevant and immaterial, back on the same line we have just objected to, and the objection was sustained there.

Trial Examiner Norwood: Objection sustained.

Mr. Werle: Judge, I do not mean to be going back on the same line. I think this is something that is a little bit different.

May we have the question read?

Trial Examiner Norwood: You asked if those conditions, if shown, the conditions which you propose to show there, would those conditions have a bearing on costs; isn't that so?

Mr. Werle: That's it, yes.

Trial Examiner Norwood: Well, the objection is sustained.

Mr. Werle: Well, then, in that connection I won't pursue that line any further, Judge.

Trial Examiner Norwood: No.

Mr. Werle: In that connection I offer to prove, through this witness, that the finer grinding required to
31413 meet these competitors' characteristics which are found in other cements does increase costs, has a direct effect on the labor and power costs, and on the cost of supplies, because the rate of grinding goes down and the unit cost goes up.

Further offer to prove, through this witness, that although increased costs have been incurred in that connection from time to time, the company has not increased its prices, and the reason that the company did not increase its prices was that it could not get any more for its cement when it did exceed these characteristics of other brands, that the buyer would not pay more for one brand than he would another.

Trial Examiner Norwood: Yes. The testimony is rejected.

Go ahead.

It would not hurt the Government to admit all of that; it has no bearing on price competition.

31416 Mr. Werle: On that I would say that we propose to show that the whole cement price level is very definitely governed by competing materials.

Trial Examiner Norwood: Well, you are not going to show it is particularly so with respect to this one Respondent here, are you?

Mr. Werle: I think the effect of this witness' testimony will be that.

31418 Trial Examiner Norwood: Do you want to show that?

Mr. Werle: Not any particular price reaction, no. I did say that we do propose to show in our defense that the price level of cement is very definitely limited and governed by prices on competing materials. Now, we cannot show that all through this one witness because he happens to be an engineer, he is familiar with that one phase of it, but we do propose to have testimony from other witnesses on that subject, and we need the basic data in the record before we can have that testimony.

31419 Trial Examiner Norwood: It is not necessary for you to offer to prove that brick and the numerous other things heretofore shown to be in competition with cement are in competition in this man's district; there is no use wasting time making that proffer.

31420 Mr. Werle: I offer to prove by this witness that some of the materials which are competitive with cement for various types of construction are brick, clay tile, clay pipe, asphalt for roads and oil for treating roads, lumber, and steel; that there was a time when brick was competitive with cement for paving purposes in addition to being competitive with cement for small and large building construction; that brick has now very widely been replaced by cement, and concrete, for paving purposes; that as to clay tile, clay pipe, they compete with cement on drains and sewers largely, and on other products where too much pressure is not involved; that the use of clay pipe has decreased in favor of concrete to a considerable degree.

31421 Trial Examiner Norwood: It is just the mere fact that cement is in competition at all, and you have not mentioned anything new so far that has not been covered by the testimony.

Mr. Werle: I do not believe this matter has been covered as to the extent to which cement and concrete are now replacing these other items, and that is because of

the price, Judge. If the price of cement were artificial and arbitrary and too high, as the Government says, it could not be replacing the other competitive building materials, unless we are also charged with maintaining the prices of all construction materials.

31422 Trial Examiner Norwood: Do you know the prices of these other things in comparison with the prices of cement?

The Witness: No, only by a broad comparison that I mentioned a while ago.

Trial Examiner Norwood: I think you had better give us something we can rely on on that. I think it is relevant for you to show that there is sufficient competition with other products to affect this price; but it appears from the examination of this witness that he has not—he does not have it.

Mr. Werle: Well, I do not think that that is a fair statement, Judge, with all deference. This witness has been in the engineering and technical side, let us say, of this industry since 1900.

Trial Examiner Norwood: But he has not made a survey of this particular thing.

Mr. Werle: Well, he has not made any survey, but it is part of his general knowledge in connection with finding out about his own product and thinking up new

31423 ways of using his own product and developing it.

Trial Examiner Norwood: This, in a general way, does not add any more than what we already have.

Mr. Werle: Well, I would like to offer—

Trial Examiner Norwood: Why waste time on it.

31424 Mr. Werle: Your Honor, before the witness is recalled, I think I was interrupted just as I was about concluding my offer of proof this morning, and just to finish that—there is not much to it.

We offer to prove further through the witness that the use of clay pipe and clay tile have decreased in favor of concrete to a considerable degree, and that the relation of the price and the quality both have been the important factors which have caused the increase of the use of concrete and cement in place of these other materials.

I think that concludes the offer on that.

Trial Examiner Norwood: You want to show the fact that concrete is able to undersell these other materials?

Mr. Werle: I am not so sure, Your Honor, as to what the fact is as to whether the price of a cubic yard of

concrete, for example, is more or less than the price of a cubic yard of some other material, or however you measure it, but the point is the price of concrete has not been so high, has not been too high because it has supplanted these other competitive materials right.

31425 down through the years, and the reason it has is because the price is right for the buyer and the quality is there. Those are the two factors that must enter into it.

Mr. MacIntyre: If Your Honor please, do we forget the factor of scarcity of material in some sections of the county which gives rise to the use of those materials? All those things come into the picture.

Mr. Werle: That may be so.

Trial Examiner Norwood: I think from Counsel's statement this material is clearly irrelevant.

Now, if you want to show the effect of this competition with these other materials on the price of the cement, I think that if you can do that by reliable figures, that it might be permissible here, although I cannot conceive that it is relevant, even then.

The argument would go to public interest, maybe, as to whether or not, if you permitted a trade restraint within an industry, whether or not the competition between the whole industry and other industries might not be sufficient to protect the public; that is the only point I see in that, and I do not believe that that is involved here.

Proceed with the examination.

31426 By Mr. Werle:

Q. Major Lewis, are you familiar with the services rendered by the Volunteer Company to its customers in addition to the mere shipment and delivery of cement to the customer?

A. Yes, sir.

Q. Have you had any opportunity, Major Lewis,

31427 to find out whether the services which your company renders to its customers in addition to getting the cement where it is supposed to go has influenced your customers one way or another in purchasing your cement as opposed to purchasing some other brand?

A. I think I know of some cases where it has had that result.

Q. Is it true or is it not true that competitors of your company render services, to your knowledge, of course, to

their customers in addition to merely getting the cement to the point where desired?

A. It has been reported to me that there has been quite a good deal of that.

Q. Other things being equal, can you say whether or not the question of service has caused purchasers to buy your brand, or some other brand?

A. I believe I can say that is true, yes.

Mr. Werle: Now, Your Honor, with that foundation it seems to me we satisfy the requirement of whether or not it has an effect on price because again it is a question of what does the customer get for the price he pays. If he gets something from one company that he does not get from another company, why, I think it is important on the question of price and the effect on price.

Trial Examiner Norwood: I think you will have to
31428 show something that gives a price advantage in some way.

Mr. Werle: Well, I recall that we have had testimony somewhat similar to this from other witnesses representing other companies explaining what services they have given, and that testimony was received at the time, and it seems to me that this company should have the same right to put in the kind of servites that it renders. They may or may not be different. I have not stacked these things up against each other to see which one does what, but this man can tell us in a few words what he does.

Trial Examiner Norwood: Bring out first the fact these services reflect in price, then you may go into the details, not before.

Mr. Werle: Well, I thought the questions I had just asked, and the answers that I got, had indicated that.

Trial Examiner Norwood: No, no.

He said that they give some services different from other companies which caused the customers to buy from his company in preference to others.

Now, let us find out the nature of those, as to cost saving.

Are those cost saving services?

The Witness: I have in mind one case, Your Honor, which I think would come under that head; yes, sir.
31429 Trial Examiner Norwood: Tell us about it.

The Witness: We have a customer in Nashville, N. C., who operates a ready-mix plant, and in his work there he has two or three different kinds of sand, and two

or three different kinds of stone, both for making concrete, and he—they were supplied to him at different prices.

He wanted to know what strength concrete he could make with various mixes at various ages from various combinations of these different materials, to find out which was the best and most economical for him to use, and we conducted quite an investigation for him in our laboratory, and determined which were the most favorable materials, and which gave the best results, and we furnished him the information.

That is one particular instance I have in mind.

Mr. Werle: I think the Examiner's question—and you correct me if I misstate this, Judge—

Trial Examiner Norwood: Certainly.

Mr. Werle: —was whether or not the services which he rendered to customers represented some saving in dollars and cents to them.

Trial Examiner Norwood: Yes.

Mr. Werle: In the nature of cost savings.

Trial Examiner Norwood: Yes.

The Witness: That was the point of my answer, yes.

31430 By Mr. Werle:

Q. Is that something that is true, or isn't it true, as to many of the other services that you do render to customers frequently?

A. I think so.

Q. Without going any further into it, is the illustration that you gave at all typical of the kind of things that you do for customers from time to time?

A. Yes, it is typical; it is possibly a little more in detail than we go in many cases, but we have gone that far in other cases, too.

Mr. Werle: I won't pursue that any further, Judge.

Trial Examiner Norwood: Yes.

Wouldn't your competitors meet that service?

The Witness: I would assume they would endeavor to, Your Honor; I don't know.

By Mr. Werle:

31431 Q. There are certain exhibits in the record which refer to the bid of your company on T.V.A. business.

First, did you personally have anything to do with your company's bids on the T.V.A.?

A. Yes, sir.

Q. Did you take any personal part in the negotiations with T.V.A.?

A. I was rather active on both of our bids.

Q. And calling your attention to Commission's Exhibit 396-A to KK, which represents your bid to the T.V.A. on a letting which was to be opened March 19, 1934.

Do you recall that bid?

A. Yes.

Q. Prior to the date of invitation for bids, represented by this exhibit, did you have any discussions with representatives of the T.V.A. concerning their cement requirements?

A. I had quite a number of discussions with various of their engineers.

Q. With what persons did you have such discussions prior to this particular invitation?

A. With Mr. Ross White, who was construction superintendent for Norris Dam; Mr. Charles Locher, who was consulting engineer for the T.V.A. on construction matters; with Mr. Barton Jones, who was, I believe, construction engineer, I think that was his title, for Norristown; with Mr. Riddle and Mr. Ackerman, who were engineers
31432 on the T.V.A. staff, concerned with the design at that time of their aggregate plant, in connection with the quarry, the production of aggregate.

Q. What was the nature of the discussion you had with these people prior to this invitation?

A. Well, in the first place, I wanted to know what kind of cement they were going to use, and in what quantities. I wanted to know when they were going to be ready to take cement, and then I was interested, in general, in their whole set-up, and we had various discussions on that point.

Q. Did you finish?

A. I have finished.

Q. This bid of yours refers to type B cement. Was that the normal standard Portland cement?

A. No, it was modified in some respects from our standard product.

Q. Will you explain just what type B cement is?

A. Well, to go back a little, at Boulder Dam they developed and specified what they called a low heat cement. By "low heat" they meant a cement which after being mixed with water would generate less than the general amount of heat in hardening, which is referred to as heat in hydra-

tion. That was done at Boulder Dam because of the very hot climate. It was felt for the T.V.A. dams, the climate being more favorable, it was not necessary to go as far as at Boulder Dam in requiring cement of low heat
31433 and hydration, so the type B cement is about half way between the normal composition and the low heat composition.

Q. Had the Volunteer Company manufactured any such cement as that prior to this T.V.A. situation?

A. No, we hadn't made any at all.

Q. Were you in any peculiar situation as to raw materials, or in any other way, so that you had some advantage over competitors in the manufacture of that type of cement?

A. Not as to raw materials or equipment, no.

Q. Well, now, as to the method of manufacturing it, is the method any different from your method of manufacturing standard cement?

A. In general, no. It required some changes in our process, some modification; that is, particularly in the grinding of the finished cement, we had to grind quite a little finer.

Q. What I had in mind is,—could you manufacture type B cement at the same time that you were manufacturing standard, or do they run through the same machinery?

A. No, they run through the same machinery and we had to make them alternately.

Q. What about the cost of manufacturing type B cement as compared with the manufacture of standard cement,—was it more costly or less costly, or did it cost the same?

A. It was—

31434 Trial Examiner Norwood: Just what do you want to show by this?

Mr. Werle: Well, Judge, I am leading up to quite a few things, and I don't know just how to state it at this time. This is merely preliminary.

Trial Examiner Norwood: Are you leading up to anything that affects the price methods of this company?

Mr. Werle: Oh, indeed, indeed, I am leading up to about half of this complaint, I think.

Specifically, I want to show that the cost of manufacturing type B cement for T.V.A.,—and that was the kind of cement that they had to manufacture for T.V.A.,—was considerably higher than the manufacture of other types of cement.

We are charged here with collusion and conspiracy on the price to T.V.A., among other things, and I think we can demonstrate through this witness, if we are permitted to pursue this line, just exactly what the facts were as to the manufacture of cement for T.V.A.,—what it cost them, what prices they offered to T.V.A., whether they were fair, or whether they were not fair, and perhaps find out whether or not this T.V.A. matter was what the
31435 Government says it was in its complaint and in its proof.

Trial Examiner Norwood: Yes.

Mr. MacIntyre: There is no offer of proof yet to the effect that they are going to attempt to show that a difference in the cost of this particular type B low heat cement made for any difference in the price quoted by this company, and the prices it quoted on other types of cement, and unless and until there is some effort to make such a showing it seems to me the whole line, as Mr. Paulson has said, is irrelevant.

Trial Examiner Norwood: Well, now, as I stated this morning, and I add further, the only confusion here arises from the state of the record, being unable, on account of the large volume of testimony and exhibits, to determine, offhand, just what is contained in that evidence that the Commission offered in the matter of the T.V.A.

Mr. Paulson: Well, Your Honor, we—

Trial Examiner Norwood: But it seems to me that the Commission has evidence in here which would indicate, and from which they might draw an inference that these companies were charging the Government too much for their cement.

I think that they introduced things that would bear on the reasonableness of their prices now.

Now, can you deny these Respondents a chance to
31436 meet that? There is one of two things, either you must make some statement about these inferences that you think could be drawn from that, or which you should refrain from drawing from it, or make some agreement as to striking such of that testimony.

I think that would be the best way, otherwise they are going to be permitted to meet that evidence.

Mr. MacIntyre: Your Honor please, we will be very frank to say at this time that an inference—that it is expected that there will be drawn from the evidence an inference that the industry, through combination, arrived

at the first price they quoted T.V.A., and quoted an identical price; that they later, through combination, arrived at another price, a lower price, that was quoted T.V.A., and it was considerably lower.

Now, the natural inferences that may flow as to whether or not the first price could just as well have been the second price, is something for the Commission and the courts, that is, to draw with respect to the reasonableness thereof, and nothing they can show now as to costs can change those facts, that they did, just a few months, or few weeks previous to quoting a very much higher price, did quote the lower price.

Trial Examiner Norwood: Yes.

Mr. MacIntyre: Now, I will be frank to say that
31437 there will be some effort on the part of Mr. Wooden, from all I can understand from him, to draw some inferences from the quotation of those two prices by the industry in an effort to negotiate some sort of a deal with the Government, but this matter of costs now offered has no bearing on such issue as that. Here is one price high. Later the industry comes in and by combination quotes a much lower price. What does cost have to do with their action in quoting a higher price in concert one time and a lower price in concert shortly thereafter?

31438 A. It costs more.

By Mr. Werle:

Q. Did you make any study of that at the time?

A. Yes. We made some esfimates.

Q. And what was the additional cost which was involved per barrel?

A. The additional cost was about 7 cents.

Q. Now, you mentioned using some different raw materials in the manufacture of type B cement. What different materials were required?

A. Well, we needed additional material high in silica, then material high in iron oxide to get the composition required.

Q. Well, now, what was the additional cost involved in connection with the, I think you call it, silica sand?

A. That was a little over a cent and a half per barrel, it worked out.

31439 Q. And how about this iron bearing material?

A. I think that was a little over 2 cents a barrel.

Q. Now, in addition to the additional cost of these

materials, was there any further additional cost, and what was it?

A. Well, for one thing we had a very dirty quarry. In order to get rid of a certain amount of clay out of the composition we had to restrip certain areas of our quarry cleaner, to get them cleaner than we had to have them for ordinary cement. That was an additional item of cost. Further, we had to increase the fineness of our product; that is, cement from about 90 percent minus 200 to, in the neighborhood, of 97 percent minus 200, and in doing that our output per mill hour from our grinding mills was proportionately reduced.

Shall I go on?

Q. Yes, if you will, please.

A. That reduction in output we checked as approximately 15 percent. At the same time, however, the mills required the same amount of power, the same amount of attendance, the same amount of repair parts, replacement supplies, so we prorated those items on the basis of the smaller output and arrived at a higher cost for labor, for power and supplies. Finally, we hired, strictly for this T.V.A. business, an additional analyst in our laboratory. That we figured as a separate additional labor cost.

31440 Q. Now, this 7 cents per barrel increased cost that you mentioned, did that include all of the additional items of cost that you actually incurred?

31441 A. No. We, in order to handle this T.V.A. cement, we had to make changes in our storage building and our pack house which cost approximately thirty or thirty-five thousand dollars. That was not included.

The witness identified Resp. Ex. 2190 as a typewritten study that he had made in July 1934 showing the increased cost by item resulting from actual experience in making type B cement earlier in the year.

31442 He prepared the report primarily for Mr. Hanahan's information for possible use in connection with this industry committee of which Mr. Hanahan was a member. He can vouch for the accuracy of the items stated in the report. He did this all himself. The witness thinks that this report was called to the attention of T.V.A. at the time, but he is not sure of the circumstances.

Trial Examiner Norwood: Well, are those costs approximately the same as it would cost other manufacturers, do you think?

The Witness: I do not know, Your Honor. It
31443 would depend on the character of their normal raw materials largely.

31445 By Mr. MacIntyre:

Q. In other words, 1.97 is what?

A. I was trying to figure that out myself. I think that 1.97 is—that was the actual increase for the month of May, 1.97.

Q. From what to what?

A. From the average power consumption for grinding normal cement during the month of May, or during the previous month, and the month of May, grinding type B cement. That is my figure, and I believe that is the actual Kilowatt hour increase per barrel for actual grinding.

Q. Well, in this tabulation on this sheet, you have got a caption "Increase in direct items of cost are there-
31446 fore as follows:" The first one, "Additional Stripping, 1.000 cents."

A. That is it.

Q. That is per barrel?

A. That is per barrel, yes.

Q. Well, can you tell me, it is an increase of that much over what?

A. Well, that is discussed up here in this second paragraph, you see, Mr. MacIntyre: stripping cost has averaged a little over 1 cent per barrel for one kiln operation, and so on.

Q. On normal cement?

A. Yes, that is on normal cement.

Q. On normal cement?

A. Yes.

Q. You are attempting to show, then—what you are attempting to show, then, is that the cost on B is 2 cents?

A. Well, that starts off with the first paragraph. To make type B cement for the T. V. A. a section of the highest grade stone in our quarry was restripped, and this stone was used, and that is the restripping that this one cent refers to. This is the cost of the original stripping, and then repeating the operation at a similar cost, don't you see.

Q. What about the second item, added sand, additional cost 1.686 cents. What is that over,—over what figure for normal cement?

A. Well, you would notice that I refer to the cost
31447 for May, 1934, the month in which only low heat figure was produced, that is referred to here, and the figures in that—both the previous months where only normal cement was produced, increased the cost for sand, amounted to this figure per barrel, 1.686 per barrel.

Q. What was the cost on normal cement, for the sand that month per barrel?

A. We made no normal cement that month. That was the month of May.

Q. Well, for previous months?

A. As far as I can tell you, 1.686 lower than this, whatever it was in May.

Q. But you cannot tell what it was?

A. I have no figures with me on that, Mr. MacIntyre.

Q. Isn't that true of some other items in that tabulation included in the increases?

A. Well, I could say this, that the time the tabulation was made I had all the figures before me, and used them, and I can testify, I think now, that they are correct to the best of my knowledge and belief.

Q. But you cannot tell us what the base was as to some of them from which you started calculating your increase?

A. No, I took it from actual records.

Q. But we do not have those records here, do we?

A. No, the records that I keep.

31448 Mr. MacIntyre: Your Honor please, until the records are produced for cross-examination of the witness with respect to the Respondents' Exhibit, for identification, 2190, we must object to the exhibit as offered. We cannot tell what we have—all we have is one unknown, and expecting the relationship as to the second, the B type, we receive, with respect to the unknown; therefore, both become unknown, which is—

Trial Examiner Norwood: I think that those figures on the regular type cement should go in with that in order to make the paper intelligible.

31449 I sustain the objection until you supply the other information.

31450 By Mr. Werle:

Q. Now, Commission's Exhibit 397, Major Lewis, purports to be an abstract of bids received by the Tennessee

Valley for Norris and Wheeler Dams, and it shows that Volunteer bid a bulk price f.o.b. your plant of $1.75 a barrel on both type B and on standard cement.

Is that a correct statement of the price that your company bid?

A. Yes, sir.

Q. Was there any discount in connection with that?

A. There was a discount of 10 cents for cash in 15 days.

31452 The witness identified Resp. Ex. 2191 as Volunteer's office copy of its first bid to the TVA, in March, 1934; Resp. Ex. 2192 as the file copy of the actual contract awarded to Volunteer on the March, 1934 invitation. He thinks that this bid, Resp. Ex. 2191, contains all the terms and conditions of Volunteer's bid to the TVA. He further identified Resp. Ex. 2192 as an executed copy of the contract with the TVA.

31453 (RESP. EXS. 2191-A to Z-13 and 2192-A to Z, were offered and received in evidence.)

Q. Now, the record, Major Lewis, shows there was a price filed with the Code Authority for this first T. V. A. letting. Do you know who filed the price which your company bid?

A. Yes, sir; we filed—it was filed by telegraph from Mr. Parsons, our sales manager.

Q. Your company filed the price?

A. Our sales manager, yes.

Q. And the bid shows a price f.o.b. mill for Norris Dam, and the contract, on the other hand, shows a destination cost to T. V. A. of $2.0696 per barrel at Coal Creek, Tenn. Do you know how that figure was arrived at?

31454 A. That was arrived at by applying the existing commercial freight from our mill to Coal Creek, Tenn. The existing freight, I think, was 8½ cents per hundredweight.

Q. Which would be what, in terms of per barrel?

A. Almost 32 cents,—just slightly under that, I think.

Q. Now, at the time that you filed that price with the Code Authority for this T. V. A. letting, did your company have a commercial price at Coal Creek, Tenn?

A. Yes.

Q. What was that commercial price?

A. The commercial price usually stated in cloth bags was, as I recall, $2.64 at Coal Creek.

Q. And, in terms of bulk cement, what would that be?

A. Well, that would mean, deducting 40 cents for the package, 5 cents because it was loaded in bulk, which would be a total of 45 cents,—that would bring the bulk price at Coal Creek down to $2.19.

Q. That was your commercial price?

A. That was our commercial price; yes, sir.

Trial Examiner Norwood: And your price to the Government was that?

The Witness: Well, our price was f.o.b. mill, not at destination.

Trial Examiner Norwood: But it worked out destination cost what?

31455 The Witness: $2.06, I think, at Coal Creek.

Trial Examiner Norwood: Go ahead.

By Mr. Werle:

Q. What part, if any, Major Lewis, did you have in determining the price which your company bid f.o.b. mill on this letting?

A. I discussed it from time to time with our president, and our sales manager. Previously one or two of the engineers made passes at me about it, and I reported that back to—

Q. What engineers do you mean,—the T. V. A. engineers?

A. The T. V. A. engineers; yes, sir.

Q. Did you discuss the question of price with engineers of the T. V. A.?

A. Yes, casually, not formally or in detail.

Q. When did those discussions take place?

A. Oh, some time prior to the letting; I don't recall the dates.

Q. Well, now, with whom did you discuss the subject of price in the T. V. A. prior to this March, 1934, letting?

A. My recollection is that we discussed it with Dr. Arthur Morgan.

Q. And did you also discuss it with—what I meant by that question was, what engineers of the T. V. A. had you discussed the question of price with?

A. I think it was Mr. Charles Locher, consulting engineer.

31456 Q. Now, will you tell us, first, about the discussions you had with Mr. Locher, or anyone else, who

was a T. V. A. engineer, prior to this particular invitation? What were those discussions?

A. I don't remember any detail, but, in general, that he pointed out that we were pretty close to this site of Norris Dam, and probably had quite an advantage over our competitors, and that in view of the size of the job something ought to be done about that.

Q. Did you discuss that phase of it with any of the other officers of your company?

A. Yes, sir.

Q. Did the discussions you had with these T. V. A. engineers with regard to price have any bearing on the price of $1.65 f.o.b. mill which you quoted on that letting?

A. Oh, I think they may have, although, as I recall it, we had discussed the matter along similar lines among ourselves at the same time, or prior to it.

Q. You said the question of your proximity to Norris Dam was raised in these discussions. What was your freight advantage to Norris Dam over your nearest competitor at that time, if you know?

A. I think it was something—somewhere around 3½ cents; that is, per hundredweight.

Q. Over the nearest competitor?

31457 A. Over the next nearest competitor; yes, sir.

Q. Now, at the time of the discussions prior to March, 1934, did the subject come up in discussions with T. V. A. representatives, of T. V. A. building its own cement plant?

A. I recall some casual mention of it, again, by Mr. Locher, that something to the effect that "You know we have a good site for a cement plant,—now it is down below Muscle Shoals on the Tennessee River."

Q. Now, as to these discussions that you had with these T. V. A. engineers, were representatives of any other cement companies present at those discussions, or participating in them?

A. No.

Q. I believe you said that the commercial freight rate from your mill to Norris Dam was 8½ cents per hundredweight?

A. Yes, sir; 8½ cents per hundredweight.

Q. Had that been the existing freight rate between those two points?

A. That was the standing commercial rate.
Q. Was any change made in that rate?
A. Finally there was.
Q. When was that made, if you remember?
A. I think it was confirmed in April, 1934.
Q. What was the nature of the change?
A. It was a reduction of 3 cents per hundredweight in the rate, from 8½ cents to 5½ cents.

31458 Q. Can you recall whether or not shipments made by your company to T. V. A. under this contract had the advantage of that reduced rate, or not?

A. Yes, I think they had the full advantage of it; I think shipments started in July.

Q. Now, let me call your attention to Respondents' Exhibit 2192, which is your contract with T. V. A.

On the first page of that exhibit, in a letter from your company to T. V. A., there is some reference to a verbal understanding with Mr. Garrity, about deleting a clause in the contract.

First, are you familiar with the reason for that situation? Do you understand that situation?

A. Yes.
Q. Will you state what that was all about?
A. This paragraph C, I think, called for delivery of cement at Coal Creek by rail at a definite price. Now, that was deleted in our case, so that the T. V. A. would retain the privilege we had given them of trucking from our mill.
Q. Was there any call for bids—or, rather, did the invitation for bids call for or make any provision for truck delivery, as you recall it?
A. As I recall the invitation, it specified f.o.b. mill price was wanted.

Q. Just to refresh your memory, will you state 31459 what was the nature of the f.o.b mill price that was called for (handing document to witness)?

A. You mean as written out here?
Q. Yes.
A. The invitation said "the cement will be delivered f.o.b cars at the shipping points shown below," and then we filled it in for our mill.
Q. And, as I understand it,—just to shorten this,—your contract made some provision for truck delivery; is that correct?

A. Yes, sir.

Q. Now, did the T. V. A. send trucks to your mill and take delivery to the trucks?

A. Of some cement; yes, sir; they did.

Q. Do you know the amount of cement that was trucked from your mill by the T. V. A.?

A. Yes, at that period, I think they trucked 1,400 barrels.

Trial Examiner Norwood: Did the Government get any discount on that transportation?

The Witness: Well, they bought it f.o.b. our mill, Your Honor.

Trial Examiner Norwood: Oh, I see.

By Mr. Werle:

Q. How far is Norris Dam from your mill, Major Lewis?

A. By the shortest road, about 35 miles.

31460 Q. What was the award you received on this March invitation?

A. We received an award of 125,000 barrels for Norris Dam.

Q. And have you shipped that entire 125,000 barrels?

A. Yes, sir.

Q. Now, what was your total T. V. A. award for the Norris Dam including subsequent invitations?

A. The second award was 360,000, which makes a total award of 485,000 barrels.

Q. Now, I don't recall whether you mentioned or not whether the question of truck delivery had been discussed with the Tennessee Valley authority engineers prior to this March contract.

A. Yes, we discussed it with them at considerable length.

Q. What was the subject matter of that discussion concerning truck delivery?

A. It originated, as I recall it, with Ross White, who had had considerable experience with the trucking of cement, I believe, to the Pine Canyon Dam in California, just prior to this, and he liked it very much, and described it to me in some detail, and suggested it as a possibility for Norris Dam, and then Mr. Locher also took it up shortly after that, and, in fact, asked me to check mileages for him. There were two possible routes, and he asked me for the mileage by both routes. I checked that up for him.

Q. Was there any talk of some special kind of 31461 truck, do you recall?

A. Their plan, as Mr. White explained it to me, was to use a large closed cylinder mounted on a truck chassis, such as they actually did use in the work at Coal Creek.

Q. Now, you said that truck delivery of about 1,400 barrels by truck to T. V. A. was made, did they take it in especially equipped trucks of any kind?

A. No, as I recall it, that was hauled in packages, cloth or paper bags, in ordinary stake body trucks.

Q. On this subject of trucking, have you found that customers of the Volunteer Company have frequently demanded the right to purchase cement at the mill for delivery to destination by truck?

A. Frequently? No.

Q. Has the Volunteer Company adopted any policy concerning delivery to customers' trucks at the mill?

A. No, we have no ironclad policy of that sort.

Q. Has there ever been a time during the period that your company has been operating that you have had an absolute policy, or any policy as to refusing to deliver to trucks?

A. No, no definite policy whatsoever.

Q. Now have there been some requests for truck delivery?

A. There have been occasional ones, but—they have been referred to me—none that I have had contact with directly, I believe.

31462 Q. Have you honored such requests, or have you not?

A. Yes, on occasion we have.

Q. What types of equipment, do you recall, have you used where you have been asked to make delivery to customers' trucks at the mill?

A. Well, aside from the T. V. A., I recall a concrete bridge job located some distance from a railroad, and we loaded trucks for that job.

There was another bridge, or a paving job, at another isolated point, or possibly two other isolated points, where it apparently would have been a hardship on the buyer to take delivery by rail.

Q. Now, in any situation where some purchaser has re-

quested truck delivery where it would have been a hardship upon him to make him take some other form of delivery, have you ever refused?

A. As far as my recollection goes, I think we have not, where there was a real showing of hardship.

Q. Is your mill so equipped and so situated that it is in a position to serve trucks with equal, or less, or greater facility than it can serve cars?

A. Well, it is a good deal more difficult for us to load trucks than it is for us to load railway cars.

Q. Are you in charge of the operations of the plant, which would include the loading and packing, and so on?

31463 A. Yes.

Q. Will you tell us what the difficulties are at your plant?

A. Well, we have a pack house adjoining concrete silos, and we have in there two bag packing machines. In addition, we have various equipment for loading in bulk. The package discharged to a loading belt, which carries the packages to the door of the railway car. We have only the one loading point which delivers directly at the railway cars on this track, and aside from these we have no other loading facilities of any sort.

Q. Now, these loading tracks that you speak of, are they ordinarily free of cars, or not?

A. No, they are usually filled with empties above the loading point and frequently filled with loaded cars below, in the course of the day's loading.

Q. You have had experience actually in loading trucks at your mill?

A. Yes.

Q. That is a fact, is it not?

A. Oh, yes.

Q. With respect to your loading labor, have you found any difference in the attitude toward loading trucks or loading cars, or doesn't it make any difference today?

31464 A. Our packers work on a piece rate basis, and they object to anything that slows down their rate of output, for that reason.

By Mr. Werle:

Q. Have requests to take delivery by truck from your plant ever assumed such proportions that you gave con-

sideration to the building of some special facilities for trucking loadings?

A. Only the possibility that the T. V. A. might ask for it.

Q. And, in that case, did you give that consideration?

A. Oh, yes.

Q. Did you find that it was necessary for you to make any additional facilities for T. V. A.'s truck deliveries?

A. As I figured, it would make it rather expensive; it would necessitate putting in a metering device of some sort to regulate and weigh the truck load, either a platform scale on which the truck would rest while it was being loaded, or an apparatus suspended above certain superstructures. We would have to build roadways to and away from this loading point; and matters of that kind.

Q. And did the T. V. A. truckloadings assume such proportions that you found it necessary to build any extra facilities?

31465 A. No, we loaded them with what facilities we had at that time.

The witness identified Resp. Ex. 2193 as a record by the consignees of the cement Volunteer has loaded in trucks from 1932 almost through 1939. It was prepared by his secretary in his office and the information appearing thereon was taken from the monthly and daily records of shipments. It accurately and completely reflects to the best of his knowledge and belief Volunteer's shipping reports with respect to truck shipments during the period covered.

Voir Dire Examination by Mr. MacIntyre.

31466 Resp. Ex. 2193 was prepared on November 8, 1939 for use in this case.

31467 (RESP. EX. 2193, was offered and received in evidence.)

Q. Apart from the customers mentioned here, Major, who have taken delivery by truck from your mill, do you know whether or not during that same period you had requests from other customers for delivery by truck?

A. Very rare, I think, Mr. Werle. I do not recall.

Q. Now, has the Volunteer Company ever im-

31468 posed any 15-cent-per-barrel charge to customers who took delivery by truck?

A. No.

Q. Has the Volunteer Company ever imposed any charge, whether it be 15 cents or some other figure, for truck delivery?

A. In addition to the cost of cement?

Q. Yes.

A. No.

Q. In the cases where you have permitted the customers to come to the mill and take delivery on trucks, what kind of a price did you quote?

A. In most cases the destination price with freight allowed; that is, with the freight deducted, I guess, is the better way to put that. That is not true, however, in every case for dealers in Knoxville on some occasions, when the dealers run short and need cement in a hurry in some cases we have let him have it and charge him the Knoxville price. In other cases, a load of cement is trucked and hauled to him (by us) no charge. It is a stand-off.

Trial Examiner Norwood: In that case you charge him the delivered-price, didn't you?

The Witness: The delivered price; yes, in both cases.

By Mr. Werle:

Q. But you have also, if I understand you correctly, have charged the price at the mill which was the 31469 delivered price with the all-rail freight deducted?

A. Yes, sir.

Q. That is the third way, if I understand you?

A. Yes, sir; three ways.

Q. Well, has there ever been any period of time, Major, when you have done one or the other of these three different methods that you have described?

A. No, just as the case comes up.

Q. From your experience with the operation of your company, do you regard delivery to destination by customers' trucks as a menace to the method of pricing that your company employs?

A. It has never appeared to us in any such light, Mr. Werle.

Q. When you have requests for delivery to customers' trucks at your mill, are you consulted, as a rule, in that connection?

A. As a rule; yes, sir.

Q. And do you have any part in determining whether or not you will honor the request in a given instance?

A. Well, it is usually discussed by Mr. Parsons and me, and we come to an agreement. I do not tell him "yes" or "no" on any occasion.

31470 Q. Just before the recess, Major Lewis, you were asked a question—"ordinarily you do not deliver to trucks". In connection with that, I want to make sure the record is straight on this: Ordinarily, do you have any requests to deliver to trucks?

A. Not ordinarily, no.

31471 Q. Now, you mentioned a moment ago, just to finish up this subject, something about your labor on loading earning less money, or something like that, in connection with truck loading. I wish you would explain that, please, as to how they earned less on truck loading than they would on car loading.

A. Well, with our set-up for loading cars with the belt delivering packages at the door of the car, we can pack at a much faster rate to cars than we can loading trucks.

Q. Have you made any estimate, or have you had the experience so that you can state how many cars you can load in a day?

31472 Q. Or how many barrels in an hour, or anything of that character?

A. Well, our records show that with everything going smoothly loading cars we can load at the rate of about 400 barrels per hour. For truck loading based on estimates of the pack house foreman largely; that is cut down to not over 150 barrels an hour.

Q. Now, coming to another subject, Major Lewis: What were the factors which your company took into consideration in determining the price of $1.65 f.o.b. mill on the first T.V.A. letting of March, 1934?

A. First, I think the feeling that in view of the size of the project and our proximity to it, that some concession in price should be made in connection with that. However, we knew that—we felt that we knew it would cost more to make type B cement. We did not know at that time how much. We had that in mind, and I think those are the two principal things we had in mind.

Q. Now, do you recall having had any conferences
31473 with Dr. A. E. Morgan, of the T.V.A., with reference to their various cement requirements during 1934?

A. Yes, sir.

Q. Can you state on how many occasions you discussed those matters with Dr. Morgan?

A. I do not know exactly, two or three or possibly four times.

Q. Do you recall when those conversations took place and where they took place?

A. I recall one in his office in March of 1934 prior to this letting, and I recall two or three in the fall of 1934 in connection with this price determination for the large contract.

Q. Now, as to these conferences you had with Dr. Morgan, who was present?

A. The one in March, Mr. Hanahan, Mr. Livers, one of our directors, Mr. Parsons, I think, and myself.

Q. Now, you say that was one conference or that there may have been more than one?

A. That was one conference I am referring to now in March.

Q. Did you have any other conferences in addition to that with Dr. Morgan?

A. Do you mean with Mr. Hanahan?

Q. Yes.

A. One other occasion, I think, Mr. Werle, but I
31474 do not remember when that was, one in the summer, possibly, or in the early fall.

Q. Now, what was the occasion for your meetings with Dr. Morgan, Mr. Hanahan, and Mr. Livers?

A. Primarily to assure Dr. Morgan that we had sufficient plants, sufficient facilities, and sufficient knowledge to fill completely the requirements of any order that he might give us.

Q. In those discussions did the question of the price which Volunteer was willing to quote, did that question come up?

A. That was referred to in this March conference there I mentioned, yes, at least in that one.

Q. Now, Dr. Morgan has testified in this proceeding attributing to either yourself or to Mr. Hanahan, of the Volunteer Company, a statement that your company could net $1.25 at its mill on this T.V.A. business and make good money on that basis; but that Volunteer could not afford to make such a price because of its fear of reprisal. Now, in any of the conversations that you had with Dr. Morgan

do you recall any discussion of a $1.25 net at the mill or $1.25 price?

A. Not in any conferences between Volunteer alone, and Dr. Morgan, no.

Q. When was that discussed?

A. I think the $1.25 discussion, the first I heard of it was in a meeting of the industry committee with the
31475 T.V.A. Committee referring to a certain contract for cement.

Q. Now, did you at any time state to Dr. Morgan, or to anyone in his presence that the Volunteer Company could not make any lower price than it had made because of its fear of reprisals?

A. No, sir.

Q. And whether or not that language, or the word "reprisals" was use, did you make any statement whereby you intended to convey the idea that you had some fear of reprisals by competitors?

A. No, I think we made definite statements to the contrary.

Q. Did Mr. Hanahan make any such statement at any of these conferences while you were present?

Mr. MacIntyre: I object. It is asking this witness now to tell us what somebody else said. He can only state what he heard someone else say possibly.

31476 A. No, sir.

By Mr. Werle:

Q. Did anyone make any such statement in your presence on the occasion of any of these conferences?

A. A statement that Volunteer could do that? No.

Trial Examiner Norwood: That you feared reprisals.

The Witness: Oh, that was—there was some reference to that in some of the things that Dr. Morgan said at one of those conferences, but not on our part.

Trial Examiner Norwood: Not on whose part?

The Witness: On Volunteer's part.

By Mr. Werle:

Q. And was any reply given to Dr. Morgan in connection with his statement on that?

Trial Examiner Norwood: He did not say he stated it. Did you say Dr. Morgan stated it?

31477 The Witness: I said I thought there was some reference to it by Dr. Morgan, Your Honor.

Trial Examiner Norwood: Go ahead.
The Witness: I did not quite get your question.
Mr. Werle: Will you read the question, please?
(Question read.)
A. I am trying to place that discussion. I think that was some time during the summer. As I recall it Dr. Morgan more or less urged us to set a price and brought out either directly or indirectly, as a question, whether we were afraid to do it for fear of reprisals, but I think Mr. Hanahan replied, as I recall it, that we had no fear of reprisals but any advantage we might get from naming a lower price would be of very short duration because it would be met very promptly.

By Mr. Werle:
Q. Have you had any experience on that?
A. In a small degree in our own company; yes, sir.
Q. And what particular experience do you have in mind?
A. Why, I had in mind a period during 1931, I think, when we named a special price for Knoxville in the hope that it would bring us more of the Knoxville business.
Q. I want to make sure the record is clear now as to whether or not you or Mr. Hanahan on any occasion where you were present told Dr. Morgan that you could make cement for T.V.A. for $1.25 a barrel and make money.
31478 A. I am quite sure neither one of us made any such statement.
The witness identified Resp. Ex. 2194-A, B as a discussion of an estimate which he made in the summer of 1934 as to what Volunteer felt would be a fair price for TVA on the large letting and outlined in detail why Volunteer felt that way. He thinks it was used by his company in negotiations with TVA. He submitted it to Mr. Hanahan who was a member of the industry committee for negotiating a fair price with TVA. It was prepared in the regular course of business with respect to this TVA matter.

Voir Dire Examination by Mr. MacIntyre.

31479 The first item appearing on Resp. Ex. 2194-A, that is "cost of cement in bins 73.30" refers to the com-
31480 plete manufacturing cost up to the storage in silos or in the bins before packing. The phrase "TVA

figure" refers to an estimate which they offered at some time previous to and during the discussion. The .7330 is the average bin cost for the five lowest mills in the Price-Waterhouse report. It is not Volunteer's cost. It is a figure adopted by TVA from the Price-Waterhouse figure and represents the bin cost for a period of seven years for the five lowest cost mills in the Southeast. The information as to the 16.03 opposite the designation "add NRA increase" came from an estimate he made of Volunteer's actual increases in cost following the NRA. The witness thinks petitioners' counsel has with him his work sheets showing the results of that study.

31481 With respect to each of these other items appear-
31482 ing on Resp. Ex. 2194-A as to cost elements, he doubts if there are any available. That was made 5½ years ago from actual records which the company had at the time.

The work sheets were based on records which he kept himself at that time and which he keeps continually
31483 since he became associated with Volunteer. He has those records available in his office.

31486 *Direct Examination (Continued) by Mr. Werle:*

Q. As I understand it, this was the action that you took on the basis of T.V.A. estimate of $1.16 per barrel; is that correct?

A. Exactly.

Q. And this is the kind of report you were making from time to time at that time in the regular course of these T.V.A. negotiations?

A. Yes, that was part of my normal duty.

31494 Q. Major Lewis, did you and your company come to any determination as to what you considered a fair price for your cement on T.V.A.?

A. Yes, sir.

Q. What was that price?

A. It was approximately $1.50 per barrel at our plant.

Q. And would you tell me whether or not this Respondents' Exhibit 2194-A and B represents the basis for that determination?

31495 A. It does.

31496 Q. Now, there are three exhibits in the record here, Major Lewis, referring to a cost study made

by Price-Waterhouse & Company in connection with—they are Commission's Exhibit 348-A and B, 349-A, B, C, 352-A, B, C, and D. Was the Volunteer Company included in that cost study made by Price-Waterhouse?

A. Yes. We sent them our figures.

Q. Did you receive a copy of that survey?

A. I did.

Q. Did you give any consideration to it?

A. I studied it rather carefully, yes.

Q. Will you state whether or not the results shown in that survey coincided with your knowledge and experience about the cost items referrend in it, or were there some features about it with which you did not agree? Just what was the situation?

31499 Q. On Commission's Exhibits, in evidence, the Commission's exhibits in evidence show that the Price-Waterhouse survey covered certain costs for the companies in the Southeastern District.

Did that survey take into account the period beginning in the fall of 1933, to your knowledge?

A. My recollection is that it extended from 1926 to 1932, inclusive, but not including 1933.

Q. Now, was there or was there not something that happened in the fall of 1933 which affected the cost of your company which were not reflected in the Price-Waterhouse survey, so far as it concerned your company?

A. Yes, sir; there was.

Q. And what was that?

31500 A. That was the initiation of the N.I.R.A., and our compliance with certain provisions of the National Recovery Act.

Q. And what was the effect of that?

A. The effect of that was to increase several of our cost items.

Q. And what costs?

A. The cost of labor, cost of fuel, and the cost of supplies.

Q. Now, can you tell us when those increased costs began to affect the Volunteer Portland Cement Company?

A. They started in July, 1933, at which time we reduced the working hours for our employees to 42 hours a week, at the same time maintaining their previously weekly pay.

Q. Were the increases substantial or were they small?

A. They were substantial because the average work week was considerably above 42 hours.

Q. Now, as to the labor increase, what percent for the year did that increase amount to?

31504 Q. And what was the percentage increased cost for your fuel?

A. That was in the neighborhood of 50 percent.

Q. And what about the increased cost of supplies which you mentioned?

A. I think that was between 20 and 25 percent.

31505

Washington, D. C.,
January 26, 1940.

31506 Mr. Wooden: Your Honor, I should appreciate saying a word or two regarding an offer that is pending, as I understood it, under the number of Respondents' Exhibit No. 2194-A and B, having to do with a compilation made by the Volunteer Company with regard to cost data.

The objection has already been made by my co-counsel that the exhibit is incompetent, irrelevant, and immaterial, and I wish to reiterate that objection.

I would like to point out that as to competency, this is not a proper showing of the Volunteer Company's costs; they know very well how to show the Volunteer Company's costs from its records, if they care to, and if that original cost data were brought in we would not object on the ground of incompetency.

Of course, if Respondents wish to provoke Counsel for the Commission toward going into costs in a thorough-going and reliable manner, after they put in this
31507 vague and indefinite material regarding costs, and thereby interminably delaying the case, why, possibly that is a logical course of procedure; but on no other ground is it logical; if they want to show costs they can show costs and show them right, and if they do not show them right, and we feel it important enough, or necessary, we will show them right.

Aside from that, Your Honor, the matter of competency, I contend, and have contended always, that the costs of the industry have no relevancy as tending to prove or disprove the existence of a combination alleged in the com-

plaint. I think that I have been consistent in standing by that position.

Now, it is a fallacy to conclude that just because the subject of costs is referred to in any exhibit, or in any testimony, that that throws down the bars to everything that may relate to costs. It does not.

Let me illustrate: In this T.V.A. situation, what we did was to show that the industry—that is, the 16 bidders, I think, on the T.V.A. project—

Trial Examiner Norwood: Yes.

Mr. Wooden: —collaborated and cooperated in putting in a price and working out a price which would represent their joint opinion. As an incident to that we put in how they worked out that price, and it was on the basis 31508 of an average cost, that is one factor of an average cost worked out by Price-Waterhouse by the industry's own choice and employment. We did not put in the Price-Waterhouse report. We did not have it, for one thing. We made no attempt to get it. We merely put in the showing that this joint arrival at price figured to T.V.A., and submitted to T. V. A., was the result of still further collaboration and concert of action and cooperation among Respondents, the 16 Respondents, with regard to costs, and that is the only thing that we did on this T.V.A.

We are not contending that there is any definite relationship between those costs and the price arrived at, or that the margin was unfair, or the price was unreasonable. We don't pretend to say, on the basis of the figures. We do say, however, that a price arrived at by combination and concert of action is unlawful, and the tendency would be to make it unreasonable, but the unreasonableness or reasonableness of it is out of the question under the terms of the Trenton Potteries decision of the Supreme Court.

I think, Your Honor, that represents my position.

Trial Examiner Norwood: Now, I follow you as to the matter of relevancy, and also as to the matter of the incompetency of this exhibit—that is, Respondents' Exhibit 2194-A, B, which I rejected yesterday, that is, for 31509 reasons I stated yesterday, and for the further reason that it is within the power of these Respondents to produce the complete picture of the cost, if any is going to be received. If it were not within their powers—all the facts were not within their possession—then possibly it would present a necessity which the court

such have applied, time and time again, in making exceptions to a certain rules might be considered here; but there is one point here of difficulty, and that is the state of the record, as to the truth in this T.V.A. matter.

31510 If the Commission is willing to strike certain portions of the T.V.A. testimony, which this testimony is offered to meet, then I think we will be well rid of the question of costs, and I shall exclude it throughout the remainder of the hearings.

Did you want to say something, Mr. Leisure?

Mr. Leisure: I was not just clear—the Examiner has mentioned about something—well, that was off the record, I think, about the motion.

We have been talking about some pending exhibits. There is no pending offer that I know anything about. The record is perfectly clear that Respondents' Exhibit 2194-A, B, was ruled out yesterday, so that there is no pending offer that I know of, and there is no pending discussion on it that I know of.

As far as Mr. Wooden's suggestion that we were offering evidence to provoke them to put in costs,—of course, we have no intention of provoking them to do anything. We do feel that costs and profits are material, and, as I have repeatedly stated, at a proper time, and in a proper way, we expect to offer such proof. But since he has taken up this exhibit that was offered and ruled out yesterday, I would like to say in reply, that we had no intention of

31511 going into the costs of making cement generally. It was immediately seized upon yesterday by Counsel for the Commission, and they asked us to approach it in that way.

All that we were doing was meeting the proof that has been put in by the Commission with respect to this T.V.A. situation. I think that the record will bear me out on it, that we were not going into costs generally; that subject was not raised.

31515 CHARLES F. LEWIS thereupon resumed the stand and testified further as follows:

Direct Examination (Resumed) by Mr. Werle.

Q. Major Lewis, will you please look at and hold this Respondents' Exhibit 2194-A and B, for identification. In the course of your answers I prefer that you do not refer to any of the figures—that is, do not mention the figures which appear on that tabulation.

31516 Q. Now, will you look at the first item on that tabulation, Major, and without referring to any of the figures, that item reads "Cost of Cement in Bins," and after that, "T.V.A. Figure." Will you state what is the source of the figure which appears on that tabulation?

A. It was taken from a tabulation which T.V.A. prepared as their idea of a fair price to pay for cement, and the source, the original source of it was, as I recall it, the Price-Waterhouse reports.

Q. And in this estimate which you made of Volunteer costs, do I understand you adopted that bin cost figure for that purpose; is that correct?

A. For the purpose of this, of arriving at this figure.

Q. All right.

Do you know as of the time of that memorandum, in the summer of 1934, whether or not the Volunteer bin cost for standard cement in your company was higher or lower than the figure shown on that report?

A. It is my recollection that it was quite a little higher.

Q. Now, coming to the second item, without referring to the figures again, that states N. R. A. increase. What was the basis and the source of the figure which appears on your memorandum opposite that heading?

31517 A. That was taken from studies which I had made of the actual increases we had experienced since the N. R. A.

By Mr. Werle:

31518 Q. And you have already testified about what those increases were, yesterday?

A. Yesterday; yes, sir.

Q. Now, will you look at the first paragraph at the bottom of that exhibit. There are a series of paragraphs

after the Arabia No. 1. Can you state whether or not those paragraphs represent your breakdown of that item of N. R. A. increase?

A. Ye , sir. That covers that.

Q. Now, is that breakdown taken from the figures of your own Volunteer Company, or is it taken from some other source?

A. It is taken from our own figures.

Q. Now, proceeding in the third item of the list at the top of that exhibit, and without referring to any of the figures there, it states "Add for type B cement." What was the basis and the source of the figure which you show there for type B cement?

A. That was based on our actual experience in the manufacture of type B cement that year.

Q. And in that connection I refer you to Respondents' Exhibit 2190, for identification, and ask you if that is the breakdown of those items on the increase for type B cement?

A. Yes, sir. The totals are not the same but it is the same study.

Q. Now, then, will you look at the next item and again, without referring to the figures, it states: "Add for
31519 Bulk Loading," and there is a figure, and opposite that "T. V. A. Figures."

What is the basis for that figure?

A. That was adopted from the tabulation of fair price furnished by the T. V. A., the $1.16 tabulation.

Q. Did you make any personal investigation of the Volunteer costs for bulk loading at that time in order to determine whether or not the figure which appears there as taken from T. V. A. was fair for your company?

The Witness: Yes. I checked it as close as I could.

31520 Q. Did you make a check sufficient for you to determine whether or not the T. V. A. figure accorded with the figures of your own company?

The Witness: Yes sir; we made a check.

By Mr. Werle:

Q. Now, then, the next item, opposite the heading "Administrative," refers to sales cost.

Will you state what was the basis and the source for the figure that appears on that exhibit?

A. The source was our average figures for 1930 and 1931.

Q. And what average figures? Whose average figures?

A. The figures in my own records.

Q. The Volunteer Company?

A. The Volunteer Company records, yes.

Q. And does the paragraph numbered 4 on the
31521 second page of that exhibit explain the breakdown of that item and the inclusion of that item in sales cost?

A. Yes, sir; it does.

Q. Now, then, the next item under "Administration" is "Association Dues."

What was the basis and what was the source for that figure which appears on the exhibit?

A. That was taken from the Price-Waterhouse report for either the ten low or the five low companies, I forget which.

Q. And does the paragraph 5 on Respondents' Exhibit 2194-B explain the inclusion of that item?

A. Yes, sir; it does.

Q. Now, then, the next item under "Admiinstration" is "Salaries and Miscellaneous."

Now, without referring to the figures there, would you tell us what was the basis and the source for those figures?

A. Our 1930 and 1931 cost records; that is, Volunteers' records.

Q. Now, the next item is "Insurance and Taxes."

Again, without referring to the figure, will you state what is the basis and the source for that figure?

A. The basis and the source of that was Volunteer's cost for 1930.

Q. Now, then, the next item is "Tax Increases."
31522 What was the basis and source of that figure, without referring to the figure?

A. That, I think, was discussed with our secretary and treasurer, Mr. Evans, and he made as close an estimate as he could as to what the probable increase in our taxes would be.

Q. Will you look at the next item, "Depreciation," and the one below that "Interest," and without referring to the figures, state what the source of those items was?

A. I simply adopt those from the T. V. A. $1.16 tabulation.

Q. Can you tell me whether or not that figure was lower or higher, or approximately the same as your own estimate of Volunteer's costs for those two items?

A. I think these figures were lower, but we adopted them, nevertheless.

Mr. Werle: Now, Your Honor, in view of the further questions and answers asked about this exhibit this morning, and in connection with Commission's Exhibit 352-C, I submit that we have satisfied even the requirements which Your Honor laid down yesterday for the admissibility of this document, and I would like to ask you to reconsider it at this time.

31524 Trial Examiner Norwood: Well, I shall ask Com-
31525 mission's Counsel to look that over very carefully and see if he can check it up with the testimony that has been gone into on it, and with this exhibit here (indicating).

By Mr. Werle:

Q. Major Lewis, in Commission's Exhibit 352-A to D,—so the record will show,—it is a memorandum from Dr. Morgan to the board of directors of the T. V. A., dated July 10, 1934. The statement is made that the Price-Waterhouse survey included the years 1926 to 1932 as a fair period for estimating costs, and that average costs during that period were considerably higher than those being realized at the end of the period.

First, will you state whether or not that was so as to your company, if you know?

A. That was included with 1932; was it not?

Q. Yes.

A. At the end of 1932 our costs were lower than the average for those years.

Q. Exactly.

Now, then, it continues that "since that time the influence of the President's Reemployment"—

31526 Mr. MacIntyre: Now, then—

Q. (Resumed.) "—Agreement and the present Code of Fair Competition for the Cement Industry have operated to more than restore the former levels of mill costs on the present low level of necessity. It is felt, how-

ever, that even if Codes of Fair Competition continue to influence costs of operation, the 1926-1932 average costs can easily be achieved by mills operating at normal rate of production due to advances in the art of cement making."

Now, will you state whether or not that statement is correct, from your knowledge and experience in your own company?

A. If I get that clear, I would say that for Volunteer it is not—I am referring to savings from the advances in the art of manufacturing cement.

Q. And will you just look at that and state whether or not the 1926 to 1932 average costs can easily be achieved by mills operating thereafter?

A. No, I don't think that's a correct statement for Volunteer.

31528 Q. Now, then, on Commission's Exhibit 352-C, the same memorandum of Dr. Morgan, there is an item of cost for the lowest five mills that would ship on T. V. A. business, and the lowest ten mills that would ship on T. V. A. business, of 5 cents per barrel, for officers' salaries, general administration, association dues, and sales expense—

Mr. MacIntyre: Now, if Your Honor please—

Q. (Continuing) —and then—

Mr. MacIntyre: Just a moment.

Q. (Continuing) —that figure—

Mr. MacIntyre: I object to the Counsel reading from exhibits to the witness. He knows very well how to properly put his question to the witness. He can ask him what the facts are with respect to any matter he wants to go into that is relevant and material to the issue here.

31530 By Mr. Werle:

Q. Major Lewis, do you consider— First, let me ask you whether your Volunteer mill has produced a million barrels of cement in recent years, in any year?

A. We have never produced that much in any year since we have been operating.

Q. Do you know of any mill in your immediate territory that has produced a million barrels a year, in recent years?

A. I wouldn't know; there are some larger mills down there than ours.

Q. Will you tell me whether or not 5 cents per barrel

is, from your knowledge and experience in your own company, an adequate item of expense for officers' salaries, general administration, association dues, and sales expense?

31535 Q. Will you tell me, if you know, the breakdown which Price-Waterhouse furnished to the T. V. A. on its cost estimate of companies—that is to say, did they give them figures of all the companies grouped, or were they broken down in some way?

A. Do you refer to the figures used by the T. V. A.?

Q. That were furnished by Price-Waterhouse Company, yes.

A. They were divided into groups, one group, I think, showing—one group including five mills of lowest cost, one of ten mills of lowest cost, and I think finally the entire number of fifteen, about fifteen mills, I believe. The idea being that the ten mills; the five mills of highest

31536 cost, would be disregarded.

Q. And do you know in which of those groups your Volunteer Company fell?

A. Either in the five or the ten low, I am not—I do not recall now which.

The witness identified Resp. Ex. 2195 as a statement he prepared in July 1934 showing in detail the cost increases Volunteer had experienced as a result of the NRA program. It was prepared by him in the regular course of business in connection with the TVA investigation from company records for the information of the president. This statement was used to establish the fact that the long time average of costs as shown by Price-Waterhouse made no allowance for these recent and rather heavy increases resulting from Volunteer's adoption of the NRA

31537 program. During this period of negotiation with TVA witness was regularly submitting memoranda of matters of this character to Mr. Hanahan, President of Volunteer. It was witness' impression that this memorandum was brought to the attention of TVA but he could not say when or how. He prepared the exhibit and he took the data from the records of the company.

To the best of his knowledge and belief he swears

31538 to the correctness of these figures.

(RESP. EX. 2195 was offered and received in evidence.)

Q. Earlier in your testimony, Major Lewis, you men-

tioned a committee of the industry that participated in these negotiations. Who was on that committee?

A. The so-called Industry Committee was composed of Blaine Smith, as chairman; Joseph Young and Ross Hanahan and George Killian as remainder of the committee.

Q. Did you subsequently become a member of that committee?

A. I was a member of a technical subcommittee working with the general committee.

31539 The witness identified Resp. Ex. 2196-A, B as a report drawn up by him from a meeting held at the Hotel Pennsylvania in New York in July 1934 between the TVA committee investigating fair price and the Industrial Committee which had been appointed to discuss the matters with TVA. He attended the meeting and the purpose of the report was to record for his benefit and for Mr. Hanahan's the general results and discussions at that meeting, the principal ones. The witness has always in the regular course of business prepared reports of such things for Mr. Hanahan and the company, and this
31540 was prepared in the regular course of business.

31542 Q. There were representatives of the T. V. A. present at that meeting?

A. I do not claim, Your Honor, that it is complete in detail covering everything that is touched on.

31544 (RESP. EX. 2196-A and 2196-B was offered and received in evidence.)

Q. Major Lewis, I would like to call your attention to the second full paragraph on Respondents' Exhibit 2196-B, and ask you to explain that statement, and just exactly what transpired there.

31545 A. That is the third paragraph on 2196-B that you refer to, Mr. Werle?

Q. Yes, this paragraph here (indicating).

A. What led up to that was a statement of Dr. Morgan to the effect that he had decided to abandon this fair price investigation for a competitive price at a plant which the T. V. A. could build on property which they owned near Sheffield, Tenn., when he made that statement Mr. Treanor emphasized the fact that this was now strictly a competitive price rather than a fair price investigation that we were now going into.

Q. Now, there is some reference to this report to a technical committee. Was such a committee appointed?

A. That was appointed by request of Mr. Treanor, and

with the agreement of Dr. Morgan, there was a technical subcommittee appointed for the industry.

Q. And, as I understand it, you were appointed to that committee?

A. I was a member of it; yes, sir.

Q. Who else was on that committee?

A. Bill Klein was chairman, and Paul VanZant was the other member.

Q. And did that committee make a survey as stated in this Respondents' Exhibit 2196-A and B?

A. That probably refers to the appointment for that purpose, and the committee did carry out that purpose.

31546 Q. Now, would you tell me briefly just what the committee did?

A. The committee met in New York, I believe, just after this July 25th meeting, and we discussed between us the method by which we were going to investigate this matter, this T. V. A. plant. We went to the library and looked up some geological information upon the deposits down at Sheffield. We blocked out the points that we were going to inspect and investigate. Then we went down to Knoxville and got in touch with Mr. W. R. Chambers, mechanical engineer with the T. V. A., who was in charge of the design and other matters in general for the T. V. A. affecting this proposed plant. He showed us general plant lay-outs that he had had prepared, showed us some figures on estimates of the cost of building the plant and of operating the plant, producing cement in the plant thereafter, gave us some information on the proposed site of the plant, and finally took us down to the site so that we were able to walk over the ground and investigate in detail. Having done that at Sheffield we came back to Knoxville and then called on Dr. Morgan at his home at Norris, Tenn., to tell him what we had done, what we proposed to do and what further information we wanted to enable us to make our study.

31547 Q. Major, I interrupted you while you were telling us just what the technical committee did at the point you stopped. Will you describe from that point on briefly what things you did in general without going into all the details of it?

A. We spent most of the month of August in working up a detailed report on these proposed plans.

Q. And that report was submitted to the T. V. A.?
A. Yes, the latter part of August.
Q. Well, as to the Judge's question, this Re-
31548 spondents' Exhibit 2194-A and B was—
Trial Examiner Norwood: It is costs.
Q. —was your memorandum or record of what you did in connection with this?
A. That was called to their attention at some time prior to the switch to the T. V. A. cement plant.
Q. Yes, but what—so that the Judge will understand what I mean—what I mean, this was your memorandum of your cost estimate?
A. Oh, yes.
Trial Examiner Norwood: I want to know whether Dr. Morgan got that before the decision was made whether or not to build their plant.
Mr. Werle: I see. I don't know if the witness answered that question.
Trial Examiner Norwood: Did he, or not?
The Witness: I can't answer that, but I think so.
Mr. Werle: Yes.
Trial Examiner Norwood: Well, those facts that are reported in there were brought before him, were they not?
The Witness: Yes, as I recall, the July 25th meeting started out with a general discussion and the presentation of figures by the industry committee to Dr. Morgan's committee, and then Dr. Morgan announced his decision to
abandon the fair price plan in favor of this—of
31549 what they could make cement for at their own plant.

By Mr. Werle:

Q. Now, you stated that this technical committee made a preliminary investigation of the plant site.
A. Yes.
The witness identified Resp. Ex. 2197 A to C as a report which he made to Mr. Hanahan outlining the preliminary steps which the committee had taken. It doesn't report in detail his observations on his visit to the proposed TVA
plant site, but in general it covers the important mat-
31550 ters which the committee considered. W. R. Chambers is a mechanical engineer with the TVA.

Examination on Voir Dire by Mr. MacIntyre.

The members of this committee were William H. Klein of Penn-Dixie, Paul Van Zandt of Universal Atlas, and the witness. Blaine Smith of Penn-Dixie and now of Universal Atlas was not a member. This was only the
31551 technical committee and Blaine Smith was not a member of the technical committee. Neither was Joseph Young of Lehigh a member of the technical committee.

Direct Examination by Mr. Werle (Continued).

31555 Before the technical committee made this visit to the proposed site of the Sheffield plant in Knoxville, he thinks he discussed the matter with this industry committee. The technical committee was an arm or a subcommittee of this industry committee.

Examination by Trial Examiner Norwood.

31556 He is the writer of this document and to the best of his knowledge and belief he testifies to the truthfulness of the statements contained therein.

(RESP. EX. 2197-A, 2197-B, and 2197-C was offered and received in evidence.)

Q. You refer in it to some difficulty about stripping at the T. V. A. plant site. What does that refer to?
31557 What does that mean?

A. Well, stripping means removing of any unusable overburden from the deposit of stone that is to be used.

Q. And what was the difficulty that you were mentioning there?

A. Well, there were two or three difficulties, one was—

Q. Just briefly tell us at this point, so that we can understand it in connection with that exhibit.

A. Well, the rather heavy overburden, including some hard overburden of siliceous stone, and considerable evidence of a very irregular surface of the deposit to be quarried, and the existence of cavities apparently filled with clay at various depths in the deposit to be used.

Q. Now, in this investigation that you and these other gentlemen made of the plant site at Sheffield, Ala., for the proposed T. V. A. plant, did you give any consideration to the availability of raw materials at that point for manufacturing the type B cement which was being used by T. V. A.

A. Yes, we considered that.

Q. Were the necessary materials for the manufacture of that cement available at that site?

A. There was a possibility—although I believe they had decided against it—that they could use this siliceous stuff on top of the limestone, the chert, to increase the silica content. There was no deposit of iron, iron
31558 oxide on the premises, and, as a matter of fact, we were not shown any shale deposits that were proposed to be used in connection with it.

Q. Now, then, in connection with the estimate which your committee made of the cost of manufacture at this proposed T. V. A. plant, what provision, if any, did you make for the cost of obtaining material with the proper content for the type B cement?

A. We allowed for the purchase of iron ore to insure a steady and uniform supply for correcting the composition. I believe also we considered the necessity for the purchase of some sand, to correct it.

Q. Did you discuss that matter with any representative of the T. V. A.?

A. Yes, we discussed that with Mr. Chambers, and I believe Major Eckel.

Q. Now, T. V. A. had made its own estimate of cost of manufacture at that plant; is that so?

A. Yes.

Q. What provision for that element of cost in securing that material was made in the T. V. A. estimate?

31559 Q. Was the estimate that the T. V. A. made for cost of manufacture at its proposed plant made available to you, Major Lewis?

A. Yes, the committee had copies of it.

Q. Were all of the items of cost set forth in detail on that estimate?

A. Not in detail, but in general the main items were outlined.

Q. And do you know what provision T. V. A. made for this element that we have been discussing?

31560 Q. Well, will you state whether or not your committee was operating in conjunction with the T. V.
A. on the basis of what they told you, or did you have some special figures that you figured out for them? What
31561 knowledge could your have had of what estimates the T. V. A. was using?

Q. And did they give them to you?
A. Oh, yes.
Q. Now, if you know, will you tell us what provision they made for securing the material, raw material, necessary to manufacture type B cement?
A. They proposed to use a limestone deposit, which I have described, and which we investigated; they proposed to use a shale, which we did not see, but was referred to as being somewhere near the steam plant at Muscle Shoals; they considered the use of a part of the overburden as the source of silica, the source of iron oxide was given us as from float carbonate to be bought from farms and hauled into the plant by farmers' wagons. I believe they estimated that would cost them, oh, a dollar a ton.
Q. Now, what was your estimate of obtaining that necessary raw material?
A. Referring to the iron oxide?
Q. Yes.
A. Well, we were afraid that would not be a sufficiently dependable source of supply, and we based our estimate on iron ore purchased from the Birmingham district in Alabama.
31562
Q. Now, your committee prepared a cost estimate for T. V. A. for building this plant, I think we have got that on the record?
A. Yes, we went into it in very full detail.
Q. In connection with stripping, which we mentioned a moment ago, did your cost estimate include anything for that?
A. Yes, the stripping was quite an item. We figured something over 16 cents a ton, as I recall it; that is the cost of stripping the overburden from the stone that was to be used.
Q. What method of stripping, if any, had been proposed by T. V. A. engineers?
A. During the discussion we finally settled on hydraulic stripping; at least, that was advanced as a cheap method by which they could open up the quarries.
Q. That would have been less costly, would it?
A. Oh, yes.
Q. Would the hydraulic stripping have been possible at the proposed T. V. A. plant location?
A. I think so, but to a rather limited extent.
Q. Will you explain that?

31565 A. In stripping hydraulically you must first have an adequate supply of water, and then adequate areas in which to store the clay remover by washing, as a secondary consideration, a proper slope of the deposit toward the drainage area to be used.

Q. In your opinion, as an engineer, would that have been feasible here?

A. Well, there was not enough room in the first
31566 place; and the slope of the ground was adverse to that kind of stripping.

Q. Upon working out these various cost estimates that you did work out for this proposed plant, did T. V. A. make available to you its proposed cement require-
31567 ments which it was expected that plant would furnish?

A. They gave us a schedule of the—showing the dams for which they proposed to buy cement, and the probable quantities of cement which would be required for each dam, and that was set up by years—they wanted so much for this dam this year, and for the other dams over the period of the proposed contract.

Q. What was that period?

A. That was from—to be from 1934 until, I believe, January 1st, next year.

Q. And what were their total estimated requirements during that five or six-year period, whatever it is?

A. In round numbers, 7½ million barrels, I think.

Q. Was it expected that the T. V. A. plant, the proposed T. V. A. plant, would furnish all these requirements?

A. No. It was pointed out by our subcommittee that it would take some time to build the plant, and in the meantime having already started they would have to purchase a certain amount of that cement from private producers.

Q. And how much cement was it expected they would have to purchase from others before they could begin to operate?

31568 A. A little under 2 million barrels.

Q. Now, then, what was the divisor which your cost estimates for this proposed plant contemplated?

A. Are you referring to construction costs, Mr. Werle, or operating costs?

Q. Well, let us have both, or whichever you had in mind.

A. Well, the committee based their whole question of whether or not a cement plant should properly be built

there on the residual amount of cement from the 7½ million, a little over 5½ million barrels.

Q. During the five-year period?

A. During the five or six-year period, whatever it was.

31569 Mr. Werle: Will you read the question, please?

(Question and answer read.)

The Witness: I had already testified to that quantity.

31570 By Mr. Werle:

Q. Now, will you tell us briefly the basis for your statement that the T.V.A. plant would not have been ready for regular operation for a year or two years, I have forgotten which period you stated?

A. Well, the normal experience in building a plant took you—a rather large one, as was proposed for the T.V.A.—is in round figures a year. It is not safe to figure less than a year; and during that year the schedule of estimated requirements furnished us by Mr. Chambers would have consumed this one million nine hundred and some thousand barrels of cement.

Q. Now, then, did that consideration—was that taken into consideration in connection with your estimated costs of operation; how would it affect the cost of operation?

A. Well, it would have affected primarily the matter of amortization of the plant.

Q. After your committee had made its study of

31571 this entire T.V.A. proposed plant site, what was your final total estimate of the cost of building this proposed plant?

A. The cost of construction we estimated at close to three million barrels, and then we added to that—

Q. Did you mean barrels—you said barrels?

A. Three million dollars. Three million dollars. We added to that working capital amounting to a little over $500,000, the working capital being the cots of materials in process, and prices of materials purchased for use, and what not.

Q. Now, in connection with that estimate, was any consideration given to the character of the principal markets for the plant's output—that is to say, the duration of that market?

A. Well, it was our view that if the program outlined

to us justified the construction of the plant, then the plant should be amortized during the period of that construction.

Q. Well, I had reference to the type of construction.

A. Of the plant?

Q. Yes.

A. Well, we tried to make it as simple and economical as we could and still build—still provide proper structures, yes.

31572 We run the Volunteer plant continuously through out the year whenever we can. Our last complete shutdown was in the Spring of 1936. Prior to that time, we had complete shutdown periods in 1932 and 1933, the reason being that we had filled our storage space and did not have enough market to permit us to empty them again or to make room for further operation. We can store about 95,000 barrels gross of finished cement which includes cement of all kinds.

Aside from TVA, we store tested cement for the highway departments of Virginia, South Carolina, Georgia and then for various other uses. We usually have a bin under

31573 United States Navy tests, and we have other customers working on contracts which call for pre-tested cement. When Volunteer has cement stored in a test to be used only for that customer, the testing laboratory or agency puts seals on the inlet to the silo and on the outlet from it. It is not the practice of Volunteer in connection with the manufacturing of tested cement, to manufacture all such cements that we expect will be used for a protracted period because we do not have enough bins. We normally set aside certain bins for certain tested cement and as fast as they are emptied we refill them again under the same test. Our silos become rather filled during the winter season, that is the cold months. If it happens that we have a bin in which there are a few hundred barrels of a tested cement that we cannot move, then it goes through as a partly empty bin. I would say we never have our storage space fully in use.

31574 Q. I call your attention to Commission's Exhibit 1339, which has been referred to in this record as the Good Friday bid. Do you recall that bid in your company?

A. Yes, sir.

Q. Rather, the invitation.

Did the Volunteer Company make any response to that invitation?

A. We made no bid but we did write a letter addressed to the Procurement Division explaining why we felt that we could not make a bid.

Q. Who wrote the letter?

A. I drafted it, largely, and discussed it with Mr. Hanahan, our president.

Q. Is it customary, Major Lewis, for you to be consulted in connection with sales matters in your company? What is your participation in the sales department?

A. No, in ordinary routine sales work I would not be consulted.

Q. What was the reason that you participated in the consideration of this Procurement Division invitation?

A. Well, it immediately brought up some serious questions of operation and storage, shipping, which I was directly concerned with.

Q. Did it raise any problem or question of storage different from the normal invitations that you re-
31575 ceived from time to time, or what was there?

A. Yes. It introduced a new element, I think I might say, into the question of pre-tested bins. It meant, as we interpreted it, that we must set aside certain bins stored with cement, which might be allocated under this invitation without the factor that we had normally had of definite assurance that it would move at specified times and rates.

Q. Were there any features other than that which entered into your company determination not to submit a bid and send a letter?

A. Yes, there were other matters. There was the means of shipment from our plant. As we understood it it could be called for at our pack house by truck or it could be called for on cars or any other means of transportation that might be provided. A further objection that we had to it, a further reason why we feared to bid on it was the fact that it provided, as I recall it, that any work being done financed in whole or in part by Government funds would come under the same contract. Well, that immediately broadened the field to a very indefinite degree as to how much cement we should have to provide, how we were going to ship it. It meant that work already in process which we were supplying through dealers could

be switched over to this direct purchase from our plant, and we felt that it would seriously upset our established dealers and our relations with them.

31576 Q. Are those all the reasons or were there some others than the ones you described?

A. Those are the principal ones I recall right now, Mr. Werle.

The witness identified Resp. Ex. 2198-A and B as a letter which Volunteer wrote to the Procurement Division with reference to the so-called Good Friday bid. He drafted that letter and participated in its formulation.

Examination by Trial Examiner Norwood.

That contains Volunteer's explanation of why it did not bid. That was a bid calling for f.o.b. mill quotations.

Direct Examination by Mr. Werle (Continued).

31577 Mr. Drummy, who signed the letter, is Volunteer's assistant sales manager. Mr. Parsons, Volunteer's sales manager, as witness recalls, was at home ill at the time and Mr. Drummy signed it in his absence.

31578 (RESP. EX. 2198-A and 2198-B was offered and received in evidence.)

Q. Now, coming to a different subject, Major Lewis: Have you found that your plant can operate at 100 percent capacity the year round?

A. No.

Q. Would it be possible to operate that way?

A. Not for our plant; no, sir.

Q. Why is that?

A. Well, the seasonal demands, the necessity for keeping all the machinery in a very highly efficient state continuously over the period of a year, the question of storage space to offset seasonal or even monthly variation in demand.

Q. Is there any other variation other than the seasonal demand in markets?

A. Oh, yes. Large projects which increase the demand very heavily in a certain section for a period, and then it disappears almost entirely and varies from year to

31579 year and from month to month.

The witness identified Resp. Ex. 2199 as a chart

prepared by him showing their shipments for years since Volunteer started operation into the various states they served; Resp. Ex. 2200 as a chart prepared by him in a similar manner but according to a different scale showing the total consumption of cement in these various states as reported in the Bureau of Mines year book. The source of the information appearing on Resp. Ex. 2199 is
31580 Volunteer's shipping records. Witness has been keeping a chart similar to that (Resp. Ex. 2199), for a number of years for his own information, except on a smaller scale.

31584 (RESP. EXS. 2199 and 2200 were offered and received in evidence.)

31585 Our practice has been to run the Volunteer plant continuously, regulating the rate of operation to that primary requirement. As to whether it is more profitable in dollars and cents, I think it is not. We can make cement cheaper by running at full capacity, then shutting down, but we think, nevertheless, it is more advantageous to run continuously.

31586 The principal factor making it more advantageous to operate continuously at a low rate of operation than to run at a high rate with periods of shutdowns, is the continuous employment of labor; secondly, frequent shutdowns have some effect on quality. There is also a matter of minor increase in power costs during frequent shutdown periods. Since the last shutdown period, 1936, as far as the kilns which are the units of production, we have operated one or two kilns twenty-four hours a day, seven days a week; the other departments occasionally six days, twenty-four hours, sometimes less. The quarries and the shops, the pack house and
31587 yard crews normally operate eight hours a day, five and one-half days a week. That would be true whether operating at peak capacity or lower than peak capacity.

Q. Well, now, in connection with the cost estimate that you and your committee prepared for the proposed T.V.A. plant, what period of operation was provided for for the quarry and the crushing plant?

A. Twelve hours a day, six days a week, I think it was.

Q. Was that on the basis of full capacity operation?

A. Full operation of the plant.

Q. What was the reason for estimating a longer period for that quarry than for your own?

A. Well, primarily, the greater quantity of stone that they would need, and also the difficulties which we felt they would encounter in getting the stone out.

Q. Can you tell us, just briefly, what those difficulties were?

A. Well, the matter of getting the stripping cleaned up ahead of the working faces. We anticipated that they would have trouble with their drilling, and their blasting; they would, we figured, get some dirt in their crushers, which would slow down crusher operation and matters of that kind.

Q. Now, in the cost estimate that you made for T.V.A., was that based on yearly operation at 100 percent
31588 capacity during the five-year period, or on what basis was that?

A. No, for the entire five-year period we estimated that the best they could expect would be 85 percent operation.

Q. Now, in connection with that five-year program, did you give any consideration in those cost estimates to future prospects of the plant after the T.V.A.'s program had been completed?

A. Well, we speculated as to what would happen to the plant when the T.V.A. program was completed, on what its value would be, what its market would be, if it was operated as a commercial plant after this program was completed.

Q. Can you give us the figures on that?

31589 The Witness: Is there a question?

(Question read.)

The Witness: As to this subsequent operation?

By Mr. Werle:

31590 Q. Yes.

A. Well, we made a careful check as close as we could from the records as to the probable consumption which would be available to such a plant in its freight par, freight advantage area. I believe we went further and figured it still wider for a 10-cent differential, but as we figured it there would be available possibly a little over 200,000 barrels a year which, of course, we concluded was too small rate of output to warrant the operation.

Q. Did you make any determination of that in terms of depreciation which you would have to allow?

Q. Well, let me ask you, Major, what basis did you use for depreciation in connection with your cost estimates on the T.V.A. plant?

A. We figured, I think, on two bases, Mr. Werle: One was depreciation during the life of the contract to scrap value, which, of course, implied the abandonment of the plant. The other was to depreciate to one-third value at the end of this five-year period, and then we speculated from that as to the—or, we studied from that as to how it would operate as a commercial plant as to ordinary business in that area.

31591 Q. Now, on the depreciation-to-scrap value, as you put it, what was your estimate, your committee's estimate of the minimum cost of manufacturing the 5½ million barrel requirements of the T.V.A. during the five-year period?

A. During the entire period we estimated that a little over $1.50 a barrel would be about the best figure they could achieve with full depreciation.

By Mr. Werle:

Q. Now, on the basis of this one-third or two-thirds depreciation you mentioned, what was your estimate as to the cost per barrel of that?

A. With two-thirds depreciation, the figure was a little under $1.40; there was about 13 or 14 cents spread there.

Q. In Respondents' Exhibit 2197-A to C, you make some reference to a proposed meeting at Nazareth, Pa. Was there some meeting held subsequent to that? This is dated August 5, 1934.

A. Oh, yes. There were subsequent meetings.

Q. And was this meeting held at Nazareth, do you recall?

A. No, sir; no meeting at Nazareth.

Q. Where was the next meeting held?

A. Now, do you refer to a meeting of the committee?

Q. Yes.

31592 A. It was held in New York City.

Q. And was that your technical committee, Mr. Klein, Mr. Van Zandt, and yourself?

A. That was the technical committee, yes.

Q. What was the purpose of that meeting?

A. That was to start the preparation of a detailed form of report on the T.V.A. project to build a cement plant.

Q. And did you prepare a detailed form of report for T.V.A.?

A. We did.

Q. Was it submitted to the T.V.A.?

A. Yes, it was submitted in the latter part of August, 1934.

The witness identified Resp. Ex. 2201-A to Z-71 as a complete report made by the so-called industry committee to T.V.A. It includes the full findings and report of the technical subcommittee, beginning at page Q and pages
31593 following. As for the pages of this industry committee report which precede page Q, witness was present when it was being prepared, but he had no particular part in that. The technical committee was concerned only with the part from page Q to Z-71.

Mr. Werle: I would like to offer, then, at this time, Your Honor, Respondents' Exhibit 2201-Q and pages following, Q to Z-71.

31602 Trial Examiner Norwood: As I understand it, this witness testified—I will ask the witness:

Did you testify that you verified all of the items and statements in that report to a sufficient extent to be able to swear to the truth thereof, to the best of your knowledge, understanding, and belief; is that right?

The Witness: I would testify, Your Honor, that I verified them sufficiently to be satisfied, in my best judgment, that they were proper figures and estimates.

Trial Examiner Norwood: Yes. And they were presented to the T.V.A.?

The Witness: Yes, sir.

Trial Examiner Norwood: In this matter?

The Witness: Yes, sir.

31603 Trial Examiner Norwood: Now, off the record.

(There was a discussion off the record.)

31607 (RESP. EX. 2201-A to 2201-Z-71 was offered and received in evidence.)

By Mr. Werle:

Q. Major Lewis, calling your attention to pages—I want to call your attention to Respondents' Exhibit 2201-Z-19 to Z-29 and ask you whether on those pages appear the sources of the estimates and the information used by your committee in that report?

A. On those pages are listed by items the cost making up the different departmental total construction costs for the plant, and there is a column of key letters which show the source of each quantity estimated, each sum estimated.

Q. And where your figure was a pure estimate, does it so appear from this exhibit?

A. Yes, it does.

Q. And where your figure was taken from some quotation received, does that appear?

A. That appears also.

Q. And that is so as to all these items?

A. That is true.

Trial Examiner Norwood: Does the report contain the keys there where we can understand what the initials are?

The Witness: Yes, sir; there is a key letter after
31608 each item and at the bottom of the page it shows what each key letter stands for.

Trial Examiner Norwood: Go ahead.

By Mr. Werle:

Q. And it also appears from this key which exhibits were accepted directly from the T.V.A.; is that correct?

A. Yes.

Q. Now, on page Z-6 of Respondents' Exhibit 220, there is a statement of certain T.V.A. dams which were proposed at that time. Can you tell me which of the dams mentioned in that list have been completed at the present time?

A. The dams completed to date are Joe Wheeler, Pickwick, Guntersville, Chicomagua, Norris, and Hiwasse.

Q. And are any of them under consideration at the present time that have not been completed?

31610 Q. Now, before we leave the report, Major, there is a photograph in here that may not be clear (referring to exhibit). I would like to ask you to explain just what that shows; that is on page W of this exhibit.

A. Well— (Witness studies exhibit.)

Q. What is that?

A. That photograph was taken, taken by me at a quarry formerly operated a few miles down stream in the same stone deposit which the T.V.A. proposed to
31611 use for that quarry at the proposed plant. We took that to illustrate the condition of the deposit.

Q. And that was to illustrate the condition of the deposit, where the T.V.A. mill would be located; is that it?

A. Exactly.

Q. Now, Major Lewis, after this report was submitted, what was the next thing in the negotiations with T.V.A. that you participated in? What occurred next?

A. Well, there was a waiting period during which the report was being studied by T.V.A. The report was mailed from New York, and I was in New York at the time. I came on home, and had discussions thereafter with Mr. Chambers, of the T.V.A., and Mr. Locker, of the T.V.A., regarding the plant, regarding the estimate, and other related matters.

Q. Now, was there some further meeting held with the committee and the representatives of the T.V.A.?

A. Yes, yes, there were.

Q. Who was present at the meeting or conference?

A. As I recall it, the most, if not all of the members of the industry committee, and the subcommittee.

Q. And who from T.V.A.?

A. We had a conference, one directly following that, Dr. Morgan was there, and Mr. Garrity, Mr. Blandford, who was the manager, I think. I think possibly a member of the T.V.A. legal staff was there, Major Eck-
31612 els, I think, was there, and possibly Mr. David, I don't recall.

Q. Now, in these conferences, this one and the others which you testified about, between the committee and T.V.A., whom did this committee purport to be representing?

A. That is the committee of the T.V.A.?

Q. No, the committee of the industry, so-called industry committee?

A. Oh, the industry committee represented simply the producers in the Southeast who would be expected to participate in the T.V.A. bid.

Q. Can you tell us, approximately, when this latest meeting you mentioned occurred, Major?

Mr. MacIntyre: And where?

The Witness: It was at Knoxville. Now, let us see if I can recall the date. It was in Knoxville, I would say during the first half of September; the exact date I don't recall.

Mr. MacIntyre: What year?

The Witness: 1934. I am not positive, but that's my recollection.

By Mr. Werle:

Q. Was there anyone on that committee not con-
31613 nected with one of the proposed shippers on the T.V.A. business?

A. That is, the industry committee?

Q. Yes.

A. Yes, Mr. Trainor was not concerned in that.

Q. And what was Mr. Trainor's part in that committee?

A. Well, my understanding was that Mr. Trainor and Dr. Arthur Morgan were old friends, and this series of negotiations, beginning early in 1934, really grew out of a conversation between Dr. Morgan and Mr. Trainor at lunch here in Washington some time early in the year, and—

Q. Was this committee a Cement Institute committee, or did it have any association with the Cement Institute?

A. Oh, no, no, not—not—no, it was not a Cement Institute committee, although I can say that the matter was taken up with—that is, Dr. Morgan's and Mr. Trainor's idea was discussed with the then president of the Institute, that's as far as it went.

Q. Yes.

Now, at this meeting that you said was held in Knoxville in early September, was this report which is Respondents' Exhibit 2201-Q to Z-71, was that discussed at that meeting, that conference?

A. I think there were a series of discussions of
31614 that at that time. The matter was not all disposed of in one day. I forgot to mention, I think Mr. W. R. Chambers' name as being there for the T.V.A. He was, of course, an important factor in that.

The witness identified Resp. Ex. 2202-A to G as a tabulation drawn up by T.V.A. engineers presumably referring to the production cost for the proposed T.V.A. cement plant. This report was discussed at the con-
31615 ference with T.V.A. in early September. The second sheet is tabulations of construction cost prepared on the T.V.A. All of these sheets, Resp. Ex. 2202-A to G, are T.V.A. estimates presented at the conference held in Knoxville. The first column on the first sheet was an

estimate of T.V.A.'s as to what they could make cement for at this proposed plant, "not the first one, but the one following that"; the second column is the cost table of the cement industry produced by the cement industry committee and taken from the formal report presented by the industry to T.V.A.; the third column represents some modification of their figures which T.V.A. decided to make presumably after studying the report; the fourth column refers back to the Price-Waterhouse figures for the
31616 five low mills in the Southeast. The pencil notations and the figures on that sheet were made by witness for various purposes. "I noted here, for example, the second was in a formal report, that is at the time I received it, and this one or two figures here showing differences in the cement industry's estimate, and the adjusted estimate. There is a group of certain factors here together in this adjusted column." The cost table referred to in column 2 of Resp. Ex. 2202-A was taken-
31617 from column 1 of Resp. Ex. 2201 page Z-35.

Mr. Werle: I offer that in evidence, Respondents' Exhibit, for identification, 2202-A through G (handing document to Mr. MacIntyre).

By Mr. Werle:

Q. Just one further question, Major: Am I correct in understanding—to get the sequence of events here—that your cost estimate was submitted to the T. V. A., there was a waiting period, this meeting was held, and this was submitted by T. V. A. as a counter-proposal; is that about it?

A. That's the way it hooked up, yes.

31621 Mr. MacIntyre: If Your Honor please, we object to the pending offer of Respondents' Exhibit 2202-A to G, inclusive. It is incompetent and immaterial.

Trial Examiner Norwood: Now, this is supporting data for that report you put in, isn't it?

The Witness: Well, it is counter-data presented to the committee by the T. V. A.

Mr. MacIntyre: Part of the incompetency of this goes to the fact that it is based on—at least in part on the Price-Waterhouse report, which, of course, it is common knowledge they have for years been an accounting firm, more than ten years, representing the cement manufac-
31622 turing industry and all of its accounting problems before the U. S. Tariff Bureau and the U. S. Con-

gress in all its fights to show the high cost, and yet we are taking them in here without cross-examination of those auditors.

Mr. Werle: I move, Your Honor, that that last statement be stricken. There isn't any testimony about that. I realize there isn't any jury here, but after all the Commission and Your Honor are going to read this. I do not think we ought to have statements like that. In the first place it is not true, and in the second place there isn't anything in the record to support it.

Trial Examiner Norwood: The motion is denied; also, the objection is overruled and the paper is received as marked.

Mr. Paulson: These rulings, I understand, are all predicated on the proposition that the evidence regarding T. V. A. costs introduced by the Commission will remain in the record?

Trial Examiner Norwood: Yes.

Mr. Paulson: And if they are removed from the record these will be removed from the record?

Trial Examiner Norwood: I shall entertain a motion to strike all this testimony with regard to costs if the evidence on which it is based is withdrawn.

Mr. Paulson: You say you will entertain a mo-
31623 tion but that is not quite the same as saying—

Trial Examiner Norwood: All the testimony and the exhibits.

Mr. Paulson: Your statement saying that you will entertain a motion is not quite the same as saying that your rulings as to the reception of these are predicated upon the presence of the Commission's exhibit in the record.

Trial Examiner Norwood: Yes.

Mr. Paulson: I should like to know whether that is Your Honor's ruling.

Trial Examiner Norwood: They are predicated on the state of the record on this subject.

Mr. Paulson: I think that is sufficient. The point is that Mr. Wooden made a statement this morning, you see, came down here particularly to make the statement this morning that he had not introduced these T. V. A. documents to show the cost of producing a barrel of cement, and that he did not intend to use them to show the cost of producing a barrel of cement, and he, as I said, has not had time to make a decision as to whether to withdraw the exhibits or not, and I therefore want to get the ruling clear.

Trial Examiner Norwood: Yes. As I understand it, the record does show the cost, the probable cost of
31624 producing cement and from the state of the record an inference may be drawn here as to whether or not these Respondents could sell their cement for $1.25 and make big money, but they were selling it at a higher price by reason of some sort of a system of reprisals or agreement, or otherwise.

Now, it is not absolutely clear as to what should be done to remove that from the record. I think it should all be removed.

Mr. Werle: Well, as to—

Trial Examiner Norwood: And, if it is—if it is withdrawn I shall strike this. I am just giving you notice.

31625 Mr. Werle: And, secondly, with respect to this discussion of withdrawing evidence, I just want to make sure that the record is clear that we would like an opportunity to be heard at any time such motion is made—

Trial Examiner Norwood: Oh, yes.

Mr. Werle: —or entertained.

Trial Examiner Norwood: Oh, yes, indeed.

Mr. Paulson: Well—

Trial Examiner Norwood: Where we get on and we find that it makes a false issue, I think the administrative process is one of correcting just such errors and any other errors—

Mr. Paulson: Well—

Trial Examiner Norwood: As we go along.

Mr. Paulson: If Counsel for the Respondents are going to oppose the withdrawing of any evidence and claim prejudice if it is withdrawn, or something like that, then we want all of these rulings held in abevance until Mr. Wooden can have time to make his decision. I have understood from Counsel's remarks heretofore that they would be satisfied to obviate introducing testimony and evidence to disprove statements in Commission's exhibits if the Commission's exhibits were withdrawn—that they are satisfied to have their testimony struck in the event it was withdrawn.

31626 Now, if they have a different position on that I think we ought to hear it at this time; otherwise we certainly would not attempt to make out a case for holding these rulings until such time as our senior counsel can be heard.

31627 Q. Major, will you look at this Respondents' Exhibit 2202-A to G again—and I am not sure that the record is clear as to what column 2 there is.

Exactly what does that column purport to show (indicating)? And will you read the heading of that column so that we have that.

A. That was apparently taken by the T. V. A. staff from the formal industry report here and set up there simply to show comparisons.

By Mr. Werle:

Q. By the "formal industry report," you mean Respondents' Exhibit 2201-Q to Z-71?

A. Yes, sir.

31628 Q. And in this Respondents' exhibit, the report of the industry technical committee, what costs were you purporting to show there?

A. We were purporting there to show the cost of producing cement at the proposed plant on the basis of two-thirds' depreciation in five years.

Q. That is, at the proposed T. V. A. plant?

A. At the proposed T. V. A. plant; yes, sir.

Q. That's all I want to get clear on that.

A. Yes.

Q. Now, in what sense did any of these cost items that you used in connection with your T. V. A. estimate, in what sense were they or did they purport to be cement industry figures for the total industry?

A. In no sense except as our judgment was supported by previous experience with actual manufacturing results.

Q. And did you have in mind costs of producing cement at places other than in your own particular area of the country?

A. Well, in making the estimate we had in mind the peculiar conditions that we saw in the proposed T. V. A. location.

31629 Q. Can you tell me whether or not the Price-Waterhouse figures, which appear on Respondents' Exhibit 2202-A, took into consideration the increased cost you mentioned beginning with the N. R. A. period (referring to exhibit)?

31630 A. In answer to the question, it is my opinion that those additional costs were not included in this tabulation on the Price-Waterhouse report.

By Mr. Werle:

Q. Now, on Respondents' Exhibit 2202-C, there
31631 is a statement at the bottom of the page in connection with certain special expected rates.

Do you know what that refers to,—if you do, will you please tell us?

A. That was explained, as I recall it, as the expectation of the T. V. A. that the railroads would give them special rates for movements from this proposed plant of about the same order as the special rates which they had for Norris Dam and Joe Wheeler Dam.

Q. Was that discussed at this meeting with representatives of the T. V. A.?

A. That was discussed, yes.

Q. And what was the discussion about that?

A. To the effect, from the industry side at least, that the special rates to Norris and to Joe Wheeler were given by the railroad in one case because of the possibility of truck competition from the Volunteer plant; in the other case, the prospective competition of water haul from I believe either the Penn-Dixie plant at Richard City, or the Marquette Company at—down on the Mississippi River; I forget the exact location.

Q. And as the result of the discussion, what happened? What did T. V. A. do? Do you recall that?

A. Well, we pointed out that there being no such competition possible from the proposed T. V. A. plant to various of these destinations they couldn't properly
31632 expect to receive special rates; the T. V. A. representatives, as I recall it, did not accede to that view, they continued to feel that they could get special rates.

The witness identified the first three columns of Resp. Ex. 2203 as being identical with Resp. Ex. 2202 C. The last two columns, however, show a modification of the TVA estimated delivered cost from their estimate as shown on Resp. Ex. 2202 C because there had been an increase. Resp. Ex. 2203 resulted from a discussion of these freights. There was some concession from the stand taken by TVA.

The difference in this column, next to the last col-
31633 umn on Resp. Ex. 2203 and the next to the last column on Resp. Ex. 2202 C represents the concession that TVA made. There have been some changes there which increase the total.

(RESP. EX. 2203 was offered and received in evidence.)

Q. Calling your attention to this figure under the heading "accrued depreciation," on Respondents' Exhibit 2203, do you know what the basis for that was, Major, and if so will you tell us?

A. That was the total of the depreciation allowed in the T. V. A. estimate, as I recall it, during the time in which the plant produced the 5,550,000 barrels, and that was taken as a credit, and it never was quite clear as to why, apparently because on the basis they still had a cement plant but they had charged off that much of it.

31634 Q. Now, have you told us how long this September conference lasted with T. V. A.?

A. The one where these documents were brought up?

Q. Yes.

A. More than one day, and I think possibly as many as three days.

Q. At any time during the period of that conference was there any discussion of what was a fair price for cement?

A. I think there was probably reference to it but no discussion.

Q. Were any of these figures which we have been talking about here calculated on the basis of what was a fair price for cement from the Volunteer Company?

A. No, not in any sense.

(The document referred to was marked for identification "Respondents' Exhibit 2204-A and 2204-B.")

The witness identified Resp. Ex. 2204-A and B as an industry committee tabulation, prepared following discus-

31635 sion of Resp. Ex. 2202 and 2203 with representatives of the T. V. A., which was submitted to the T. V. A. on one of the days of the conference. This was a counter-proposal from his committee after having received a counter-proposal from the T. V. A.

31635 (RESP. EX. 2204-A and 2204-B was offered and received in evidence.)

Q. Major, I notice that the T. V. A. estimated delivery cost appearing on Respondents' Exhibit 2204-A for

31636 the various dams are uniformly 15 cents higher than on Respondents' Exhibit 2203. What is the explanation for that, if you know?

A. Well, that represented, for the purpose of this tabulation, at least, acceptance of the destination figures shown by the T. V. A. on Exhibit 2203, but with the addi-

tion of 15 cents per barrel which Dr. Morgan had mentioned a number of times as representing his disinclination to make cement for T. V. A. in a cement plant—that is, he was willing to pay that much more, so he stated, to a commercial plant to save himself the necessity for manufacturing, so that is added in this tabulation to produce a total figure.

31637 Q. I will show you a copy of it, Major. It may refresh your memory.

A. I cannot remember them by numbers.

That does not purport to show any actual costs for the Volunteer plant as far as manufacturing is concerned. Now, we derive figures—we took certain figures

31638 from previous cost records, and it is more, I would say, a considered estimate of what was a fair price for T. V. A. cement rather than a recapitulation of actual figures for Volunteer.

31639 Q. Major Lewis, when you left the conference with T. V. A. in early September that lasted a couple of days, did you know whether or not T. V. A. was going to build a cement plant?

A. No, sir.

Q. Did you understand that there was any real intention on the part of T. V. A. to build a plant?

A. It was so represented to me by members of the T. V. A. staff; yes, sir; that they were, they still were considering it, not they they had actually decided to build it.

Q. Now, as I understand your testimony, your

31640 discussions with T. V. A. in July, 1934, had begun on a question of what would be a fair price for cement for your company and others to sell to T. V. A.; is that correct?

A. That had been the basis during the spring, and up until this July 25th conference in New York.

Q. At the time of the September conference, was that still the basis of the discussion, what would be a fair price for cement, or was there something else?

A. At that time it was a question of competitive price at destination.

Q. Competitive with what?

A. Competitive with the proposed T. V. A. cement plant to be built at Musele Shoals.

Q. Now, at whose instance did the discussions and negotiations change from the question of a fair price to the question of a competitive price?

A. At Dr. Morgan's instance.

Trial Examiner Norwood: Wasn't the final settlement on the basis of a fair price?

The Witness: No, sir; no, sir; it was not, Your Honor.

31641 Mr. Werle: Well, I think that the record ought to show that our offers of these exhibits haven't been conditioned in any way, and that by permitting them to go in in this fashion that we cannot be taken to consent to this possible future arrangement that has been suggested. I mean, so far as we are concerned, we are not; we are offering them.

Trial Examiner Norwood: Counsel will not be
31642 taken to consent to any of that.

Mr. Leisure: The condition, as I understood it, is they are subject to a future motion to strike. That is all the condition I know of.

Trial Examiner Norwood: Subject to condition, anyway.

Mr. Werle: Yes.

Trial Examiner Norwood: I am simply giving Counsel notice that we may decide to—

Mr. Paulson: Oh, that is all—

Trial Examiner Norwood: —put the record in better condition.

Mr. Paulson: Oh, that is altogether contrary to what I understand.

Your Honor has ruled, as I understand it, with regard to each of these that you are receiving them not because they are competent, and not because they are material or relevant to the issue in the case, but because when the issues were not clear you allowed the motion to put in certain exhibits, and the understanding was that until that issue was removed that you were going to receive these incompetent, irrelevant, and immaterial documents.

Trial Examiner Norwood: I don't think that is clear.

Mr. Paulson: That is my understanding, and that you are not saying that they are material and relevant
31643 to the issues in the case but to the documents which are in the record.

Trial Examiner Norwood: I don't say that they are not relevant and material.

Mr. Paulson: To the issues in the case?

Trial Examiner Norwood: Yes.

Mr. Paulson: Well, it is going to lead us into a very difficult position here.

Trial Examiner Norwood: I say if we make a study of it and find that they are not, and if the Commission's Counsel after reconsideration finds that this previous testimony as to the costs is not relevant and material, that in view of the subsequent developments he wants that withdrawn, then I shall consider a motion to strike these exhibits and all of this testimony.

Mr. Paulson: Well, you see, Mr. Wooden came in particularly this morning—

Trial Examiner Norwood: Yes.

Mr. Paulson: —to make plain that he wants to keep out the side issue that Counsel for the Respondents are attempting to inject.

Mr. Wooden felt he had not raised the issue in introducing the exhibits. He said in corroboration of what we said, and objected to, that he introduced these to show the degree of the threat—

31644 Trial Examiner Norwood: Yes.

Mr. Paulson: —as part of the res gestae of his demonstration that there was a threat, and that pursuant to that threat the industry capitulated and gave the T. V. A. a better price than was given to the commercial world.

It has been our purpose to prevent the intervention of side issues. We don't want this to grow into a side issue.

But, if Your Honor receives these unqualifiedly, and they stay in the record, notwithstanding the withdrawal by us of those other exhibits, then we will have to come in in rebuttal and meet this side issue—and that is our purpose in withdrawing them. We have never felt that these are competent, relevant, and material.

Trial Examiner Norwood: The situation is very clear and Mr. Wooden and Counsel for the Commission know what they have to do in order to avoid this side issue. Now, if they do that, why, I think they can avoid it.

31645 By Mr. Werle:

Q. Major Lewis, I will show you Respondents' Exhibit 2205—

Trial Examiner Norwood: I will say, before you commence, that, that it is hard to say, in view of the breadth of these issues, just what degree of relevancy some of this material has, until we have studied it.

Go ahead.

31646 The witness identified Resp. Ex. 2205 as a file copy of a letter which he wrote to Blaine Smith as chairman of the industry committee on September 15, 1934, outlining further discussions that witness had had with certain individuals in regard to various features of the proposed T.V.A. cement plant. It was customary during the time witness was serving on this committee to send reports to Mr. Smith on discussions that witness had with representatives of the T.V.A. Witness did that on several occasions, because he was the local contact man, that is, the only member of the committee who lived in Knoxville. To the best of his knowledge and belief that letter accurately reports witness' conversations with the persons mentioned.

31647 Q. Will you tell me, Major, which of two things this paper is,—was it a cost estimate for your company on making T.V.A. cement, or does it represent a figure at which you felt was a fair one to sell T.V.A. cement for?

In other words, is that $1.50—whatever it is on there—does that represent what you thought was a fair price to sell cement to the T.V.A. for, or does it represent a cost estimate of what it would cost you to make that cement?

31648 A. It was, in my opinion, Mr. Werle, as an estimate of cost for making the cement.

Q. And that is what the title of it says, is that not correct?

A. I didn't notice.

Trial Examiner Norwood: Estimate of cost or selling price?

Mr. Werle: That is what I am trying to find out, Judge.

The Witness: No, an estimate of cost, Your Honor.

Mr. MacIntyre: Cost.

The Witness: Yes, it says so on the title.

By Mr. Werle:

Q. Now, Major Lewis, did you, at some time subsequent to this conference with the T.V.A., have any further discussions with representatives of the T.V.A.?

A. Yes.

Q. Let me direct your attention specifically to some discussion you had with Mr. Locher and Mr. Chambers, of the T.V.A.

Do you recall such a discussion, and where was it held?

A. Well, I recall discussions, more than one—one or more in the T.V.A. offices; another one, I believe, out at our plant, which Mr. Locher visited, just in those two places, either at our plant, or in the T. V. A. office building.

31649 Q. Who is Mr. Agathey?

A. Mr. Agathey was an engineer from the Allis Chalmers Manufacturing Company who had been in Knoxville some time making estimates and general plant layouts covering the proposed T.V.A. cement plant.

Q. Did he visit your plant with Mr. Locher and Mr. Chambers in September of 1934?

A. Mr. Agathey did not, so far as I recall, no.

Q. Was he present in any discussion you had with Mr. Locher?

A. He was present—yes, he was present at one or more conferences I had with Mr. Locher in the T.V.A. Building.

Q. Will you tell me whether or not that discussion at which Mr. Agathey was present included a discussion of proper cost for producing limestone and cement?

A. Yes, that was one of the subjects we discussed when Mr. Agathey was present, I recall.

31650 Washington, D. C.,
January 30, 1940.

31651 In the matter of this Commission's Exhibit 571-4-K and 4-L, I have checked the further points about it, and I am sure that this was received in evidence and should be on the list of which page 8487 was part, so let the record show that Commission's Exhibit 571-4-K and 4-L is in evidence.)

31656 CHARLES F. LEWIS thereupon resumed the stand and testified further as follows:

Direct Examination by Mr. Werle (Continued).

Q. Major Lewis, while you were on the witness stand last Thursday you testified concerning your bid to the Tennessee Valley Authority in March of 1934.

So that there won't be any question on the record as to

the kind of price that you quoted on that invitation, will you tell us now whether that was an f.o.b. mill price or destination cost, or what it was?

31657 A. It was strictly an f.o.b. mill price.

Q. And I understand you to say that that price was filed with the Code Authority by your company?

A. Yes, it was.

Q. And how was it filed? Was it filed in that fashion, or was it filed in some other terms?

A. No, it was filed f.o.b. mill, very distinctly.

Q. Was there any consultation with any competitors of your company in connection with that price?

A. No, sir.

Q. Was there any such thing as a committee of the industry, or of the bidders, in that area, in existence at that time?

A. No, there was no committee at that time. We were—we were, of course, acting independently.

Q. Now, when we closed last Friday we were talking about a conference that you had with Mr. Locher and Mr. Chambers and Mr. Agathey in September of 1934. Do you recall that?

A. Yes.

Q. Will you tell us, briefly, what the discussion was about with those gentlemen?

A. Well, it started by Mr. Locher's statement to me that the report of the so-called industry committee, particularly as to the cost figures, had been turned over to him by Dr. Arthur Morgan to review, and he wanted to go over the matter in some detail with me.

31658 Q. Did you go over the matter at that time?

A. I did.

Q. Did you discuss exact figures, or were you discussing it merely in general terms?

A. No, we discussed exact figures. As I recall it, I showed Mr. Locher the cost record which I keep, and drew comparisons from that on the—to support the estimate that we had in this report.

Q. Did Mr. Locher at that time discuss T.V.A.'s estimate of his own manufacturing cost at the proposed plant?

A. Yes, he was going over that and trying to check it, oh, more or less independently, with his own figures.

Q. Do you recall what figure he had for manufactur-

ing cost on cars for the T.V.A. proposed plant?

31660 Q. In the discussion which you had with Mr. Locher as to what T.V.A.'s cost, estimated cost of manufacture would be, did he include any item of insurance of any kind?

31661 Q. Did you discuss with Mr. Locher and Mr. Chambers at that time the Price-Waterhouse report?

A. Yes.

Q. What was the discussion about that, please?

A. Well, the gist of it was that Mr. Locher was pleased to note that the figure he arrived at independently by this discussion was in very close conformity with Price-Waterhouse figures.

31663 Q. Did you, Major Lewis, either at the time of these discussions with Mr. Locher and Mr. Chambers, or at any other time previous to or subsequent to that, make available to them the records of your company on costs at that time?

A. I think I did at that time; as I recall it, I

31664 took Mr. Chambers and Mr. Locher out to our plant, showed them around, and explained the various operations and methods, and then took them in my office and showed them the records that I keep, myself, of the cost, by items and by departments, and our discussion was largely based on that, and Mr. Locher's own experience, of course, which was pretty wide.

Q. But what I am trying to get at is, did they have complete access to your records at that time?

A. Yes, there was nothing that I refused to show them, or failed to show them, that I knew bore on the question that we were discussing.

Q. Now, Commission's Exhibit 401 is an abstract of the bids received by T.V.A. on October 15, 1934. Do you recall that invitation, Major, and did your company bid on it?

A. Yes, I recall it, and we bid.

By Mr. Werle:

Q. Major Lewis, I will show you Respondents' Exhibit 2206-A to Z-26 and ask you to state what that is, please (handing document to witness)?

31665 A. That is our office copy of the bid as we submitted it to the T.V.A.

Q. Is that the bid, Major, or is that the contract?

A. Well, that is our bid, I think. I notice some pencil notations in there. Let me see it, just a moment.

A. I am quite sure that's the bid. (Indicating.) You see, "We beg to submit herewith our formal bid."

31667 (RESP. EX. 2206-A to 2206-Z-26 was offered and received in evidence.)

Q. What dams did you bid on at that time, Major?

A. We bid on the French Broad, Holston River Dams, Norris Dam, Hiwassee Dam, and on what was then known as White's Creek Dam on the Tennessee River, now called Watt's Bar.

Q. How were your prices determined on that bid?

A. For French Broad, Holston, and Norris, we were the closest mill freightwise. For Hiwassee and Watt's Bar we were on a par freight with another bidder.

Q. Well, generally—I did not mean to have you go into that detail—who determined the prices which you would quote?

A. Oh, the prices were determined by the—by the formula given us by Dr. Morgan.

Q. Well, were those prices that you bid based on a fair price theory, so far as your experience on that committee was concerned?

31668 A. No, sir.

Q. From your study of the—

Trial Examiner Norwood (interposing): It was not based on any agreement with Dr. Morgan, this understanding?

The Witness: No, sir; it was not.

Trial Examiner Norwood: Well, then, the only effect of those negotiations was to stop this move of the Government to build a cement mill? There wasn't any contemplation of agreement on the part of any cement manufacturers, or sellers of cement, about that, or an understanding as to the price?

The Witness: Well, as I see it, Your Honor, there was acceptance or submission to a formula.

Trial Examiner Norwood: Yes.

The Witness: It is not an agreement, as I understood it.

Trial Examiner Norwood: And in submitting this bid you disregarded that formula; is that right?

The Witness: No, we followed the formula.

Trial Examiner Norwood: I see.

By Mr. Werle:

Q. And who laid down the formula, Major Lewis?

A. Dr. Morgan, acting for the T.V.A.

Q. Now, from your study of the proposed Ten-
31669 nessee Valley Authority plant costs which you made, were the prices which you bid on this invitation based on what T.V.A. could have made and furnished the cement for to its own dams?

A. Will you repeat that question? I did not quite get the tenor of it.

A. No.

Q. Were your prices higher than that, or lower than that?

A. They were lower, in my judgment.

Q. Major Lewis, there is a clause in your contract, which is in evidence on this letting, section 24, I believe it is, which provided for increasing or decreasing prices as certain costs increased or decreased.

Will you explain that clause, please?

A. That was a clause put in in view of the long period of the contract, designed to protect the contractors against possible inflationary price increases, and to give the Tennessee Valley Authority, on the other hand, the advantage of any reductions in the cost of manufacturing the cement.

Q. Was that clause used by all of the bidders?

A. Yes, but modified in the case of some of them.

Q. And has the clause been put into operation?

A. Yes, it has been in operation from the date
31670 of the contract.

Q. Now, when you said "modified," what do you mean by that?

A. Well, the intent of section 24, the secondary intent, was that these changes in the prices should be individual, applying only to the mill which encountered the changes.

At the time the bids were put in there was a clause added for several of the companies, to the effect that they would meet any reduction in the cost brought about by the operation of this section 24, with the effect of reducing the price to an individual contractor, that is, they would meet that price whether they encountered the reduction or not.

Q. How did your company become aware of the fact that some of the bidders were using that clause?

A. Through the filing with the Code Authority, as I recall it.

Q. Was that filing as to that clause met by all of the bidders?

A. No, sir.

Q. Did your company meet it?

A. We did not.

Q. Now, you were awarded certain business on this October, 1934, letting. What were the awards which you received?

A. We received an award of 50 percent of the Holston and French Broad requirements. I forgot the percentage,
31671 but it amounted to 360,000 barrels for Norris Dam, 25 per cent of Hiwassee and 30 percent of Watt's Bar.

Q. Your total award in barrels was what?

A. It was in the neighborhood of a million and a half.

Q. Have you been making shipments on those awards since that time?

A. Yes, we have made shipments.

Q. Have you made any shipments—well, have you made shipments on all of those dams?

A. No, only Hiwassee and Norris.

Q. Not on any of the others?

A. No, sir.

Q. What has been the total amount which you shipped T.V.A. on this award?

A. It is about 730,000 barrels, I believe.

Q. How long have you been making shipments?

A. That is, starting with 1934 and going through 1939.

Q. Have you shipped on these awards every year since the fall of 1934?

A. No, sir—I say we have not—there were two years when we—one year, I think, we made no shipments, and another year where they were quite nominal, just a few thousand barrels.

Q. What were those years?

A. These were 1936 and 1937.

Q. And the year in which you made no shipments?

A. I think in—I think in 1937, I am not quite cer-
31672 tain of that, but I think in 1937 we made no shipments.

Q. Now, you said you received about 25 percent of the Hiwasse requirements, I think?

A. Yes.

Q. And you have shipped and concluded your shipments on that dam?

A. Yes, we shipped—made our last shipment to Hiwassee the early part of this month.

Q. Did you ship 25 percent of the total requirements of that dam?

A. Yes.

31673 Q. By that you mean you shipped 25 percent of
31674 1,200,000 barrels for that dam, which was the amount called for?

A. No, that amount was considerably reduced when the dam was actually built.

Q. And you shipped 25 percent of the actual requirements?

A. Of the actual use of the cement, yes.

31676 Q. Well, I do not know whether you have told us, Major Lewis, how much of the million, two hundred thousand, barrels called for on Hiwassee Dam was actually used on the Hiwassee Dam,—just what that was.

A. It was, I think, 780,000 barrels.

Q. Then, as I understand it, you shipped 25 per cent of the 780,000 barrels?

A. Yes, within a few barrels.

Q. From your observation of the progress of these T. V. A. dams, Major Lewis, what effect, if any, would this have upon your cost estimate report, those T. V. A. dams, or, rather, of the T. V. A. cement plant?

A. Well, of course, any reduction in the quantity used would lessen the justification for the dam, in my point of view.

Q. Lessen the justification for the dam, you say?

A. I mean for the proposed T. V. A. cement plant.

Q. Aside from lessening the justification, what effect does that have upon the cost, the question of the amount of cement they actually used?

A. It will have the effect of increasing the cost.

31677 Q. Now, there is testimony by one of the Government witnesses that the threat of a T. V. A. plant had an immediate effect on the price, itself. Was that true, or not?

A. No, I think the record of the negotiations shows that that was not true.

Trial Examiner Norwood: Have an ultimate effect, did it, or not?

The Witness: I would hate to say just what the ultimate effect was.

Q. Now, there is also testimony about your company in the record, at page 2665, that when Volunteer Company's costs went up they reinstated their price immediately to the 9-cent level. Now, do you know what that testimony referred to?

A. That refers to the operation of this section 24 of the price change clause in the contract. Under section 24 we first had a reduction in our costs of somewhere around 6 cents per barrel, which reduced the price of cement sold to T. V. A. Then, later, I think on January 1, 1937, we had an increase of 9 cents, including a formal increase in the wage rates.

Q. When did that increase occur?

A. In January, 1937, I believe.

Q. You mentioned wages. What other items entered into that?

A. Well, there were wages, fuel, power, and purchase of raw materials; those are the four items considered.

31678 Q. What, by the way, was the source of your power at that time?

A. We were buying from the Tennessee Public Service.

31679 Q. Well, now, Major, I think I interrupted you on the statement of this increase in your costs. Will you tell us just exactly what happened in that situation; that is, T. V. A.

31680 Q. Well, Major, when you first began to incur these increased costs, what did you do?

A. Under the provisions of this contract we submitted at 3 months' intervals a report to the T. V. A. showing the cost of these four items for the previous 3 months' period. If there was a total change in the arithmetic total of the changes in these four items of 5 cents or more, then there was a formal change made in the contract price.

Q. I understand that T. V. A. would have obtained notice of that increase in your costs as a result of this interval report that you had to send them under the contract; is that right?

A. Yes, that is right.

Q. Now, when T. V. A. became aware of it, in that fashion, what happened?

A. Mr. Chambers, W. R. Chambers, who was handling that for the T. V. A., called me on the telephone and in substance he said that, "We have your report showing in-

creases in your costs. What do you want me to do about it?" and I said, "Well, we want it to take its regular course under the contract, and Mr. Chambers then
31681 said something to the effect that under the contract our costs could not go up. I told him that that was an extraordinary view, and I was quite certain he was mistaken and I would come over and discuss it with him, I believe, the next day.

Q. Now, just to shorten this a little, Major, did you have a personal discussion with Mr. Chambers about that item, then?

A. With Mr. Chambers and a member of the T. V. A. legal staff.

Q. And what was their position in that discussion, briefly?

A. That the prices having gone down they could not go up individually but must go up simultaneously only when there were simultaneous increases (in the costs of all contractors) would the cost of any contract be increased.

Q. Did I understand it, your costs had gone up and you wanted the increase, and you had no connection in this matter with any other bidder?

A. No, this was purely individual.

Q. It was your own individual cost?

A. Yes.

Q. And what was the final outcome of that situation?

A. The final outcome was that they reversed that position and accepted the view I expressed, that the cost should go up.

Commission's Exhibit 547-3-W to 4-A purports to be the minutes of a meeting in Knoxville, Tenn., and indi-
31682 dicates that you were present at that meeting with Mr. H. J. Davis and Mr. Fred C. Parsons. Do you recall that,—in July, 1935?

A. Yes. I recall that.

Q. Was it your custom to attend meetings of The Cement Institute, Major Lewis?

A. No, no.

Q. On what occasions have you attended such meetings?

A. Well, I attended one meeting, I recall, on the question of the allocation of available business—possibly two meetings where that was brought up.

Q. Do you mean under the Code?

A. Yes, in the Code.

Q. In that connection was any plan of sharing or allocating business ever put into effect in your area?

A. No, it was not.

Q. As far as your company is concerned, have you ever been a party to any such plan of allocating or sharing business at any time?

A. No, sir.

Q. Now, can you tell us how you happened to attend this meeting, Major Lewis, if you remember?

31683 A. I had been discussing for several months with Mr. Rockwell, who was—I forget what he called it exactly, he was the senior traffic man in the T. V. A.—the question of tare weights on the cars we were using for shipments of bulk cement, and we had, at Mr. Rockwell's request, we had re-weighed all the cars used in that movement in February, and there was an indication that the tare weights were uniformly high, too high—that is, either too high or two low; anyway, they were not getting the proper, the full amount of cement. They were re-weighed again in the summer and we had arrived at a figure showing the average of something over a barrel per car for the movement as having been charged to T. V. A. representing cement they did not get due to the inaccuracy of these tare weights, and I suggested to Mr. Rockwell, in connection with that, that before we settled the matter that it be discussed fully with the other interested shippers, the other companies at Norris Dam. We did not want to make any settlement for them, and I attended this meeting, which is referred to in the exhibit, principally to bring up this question of tare weight.

31684 Q. I call your attention, Major Lewis, to this third full paragraph on Commission's Exhibit 547-3-Y, and ask you if that is a matter of tare weights and the discussion that you brought up about that at that meeting there; is that what you had reference to?

A. Yes, sir.

Q. When you referred to that matter?

A. Yes, sir.

Q. Was that matter still in discussion between yourself and Mr. Rockwell in July of 1935?

A. Yes. We were still discussing that. It had not been settled.

31689 Q. Major Lewis, will you look at Commission's Exhibit 547-4-D to 4-J, inclusive, and tell me whether

or not any such series of papers as those were discussed at this meeting referred to in that Commission's exhibit any time while you were there?

A. That seems to be some discussion of marketing, some detail. I have no recollection of any discussion of that while I was at the meeting.

Q. When you say "that," you mean this exhibit that I showed you; is that correct?

A. Yes.

Q. Was there any discussion of any method of marketing, or anything of this character at the meeting while you were there?

A. There may have been some general discussion, but I do not have any recollection of it.

31690 Q. And did you ever see this paper before, or anything like that?

A. No, sir.

Q. Have you had any part, Major, in the determination of the policy of the Volunteer Company with respect to its direct sales, and its dealer sales—do you have any participation in that?

A. Not directly. I have a general knowledge of it.

Q. And can you tell us whether or not the Volunteer Company issued any announced policy to its trade as to the kinds of business it would sell direct and through a dealer?

A. Yes, I recall that we did.

Q. Do you recall whether or not that announcement was issued prior to this meeting in July of 1935, or was it subsequent to it, or was it at the same time, or when?

A. My recollection is that it was issued about May 1, 1935.

Q. Now, do you know whether or not after this meeting of July, 1935, your company issued any new policy?

A. I think that the one issued on May 1st was the only one, the only formal policy we ever issued.

Q. Is your company currently following the policy which you say was issued in May, 1935?

A. In general, I think we are still following it, yes.

Q. In general; how about in particular?

A. I would not know all the details, but I think 31691 there have been some minor departures from the announced policy.

31693 By Mr. Werle:

Q. Now, coming to another subject, Major Lewis: Have the sales costs of the Volunteer Company changed upward or downward since the spring of 1935?

A. Yes, they have changed both ways.

Q. What has been the cause of the variations upward and downward?

A. Principally volume of shipments; that is, the divisor.

Q. Will you explain that?

A. Well, the costs, themselves, are rather uniform in dollars, and in working that into costs per barrel the divisor, of course, is the factor which brings about the variation.

31694 Q. I call your attention to Commission's Exhibit 976, and particularly page 10-Q, which purports to be—

Q. It purports to be the answer of your company to the Burns and Clark questionnaire, Major Lewis. Did you have anything to do with the preparation of the answers in this questionnaire?

A. No, sir.

Q. Now, can you tell me whether or not it is correct the sales made to public authorities in 1934 by your company caused an appreciable change in your selling costs at that time?

A. No, I do not think I would say that.

Q. Did you make any attempt to apportion your
31695 selling costs among customers or classes of customers, or anything of that kind?

A. No, sir. We just figured it out in cents per barrel.

Q. But in your experience in dealing with costs in your company, would that be a feasible way to apportion your sales costs?

A. I believe it would be impossible to do it with any close accuracy.

Q. Will you state why that is, in your opinion?

31696 A. Largely, I would say, because much of our sales efforts is not immediately productive, and that that is productive is not limited in its extent; that is, it may produce one car of cement, it may produce 10 cars. We have no way of evaluating that.

Q. Do you consider that because some particular contractor or dealer takes more cement in one year than he does in another, that you can properly apportion sales

costs as between him and some other contractor or dealer customer?

A. I do not see how we could.

Q. Now, on the basis of your knowledge and experience in dealing with the T. V. A., would you say that your sales costs on the T. V. A. basis, if it were appertioned, would have been any less than your sales costs on other business?

A. If it were to be apportioned at all, I would say it costs us more.

31697 Q. What particular effort did you have in mind, Major? I mean, what is the basis of your statement?

A. Well, the fact that Mr. Hanahan, Mr. Davis, our vice-president, Mr. Parsons, and I spent a good deal of time on this T. V. A. business. I spent a very large part of my time for several months on it.

Q. Do you consider that the time spent by yourself and other executives is properly apportioned sales costs?

A. If there is to be an apportionment, I should say unquestionably.

Q. During the period covered in this Burns and Clark questionnaire, Major Lewis—that is, I believe it purports to cover from 1928 or through 1934, during that period; were your costs other than sales costs also changing upward or downward?

A. That was from 1926?

31698 Q. 1928 to 1934.

A. In 1928, yes, they were. All our costs were changing upward and downward.

Q. Can you say if there was any trend one way or another during that period?

A. What was the end of the period, what year?

Q. Through 1934.

A. Well, there was a decided upward trend in the fall of 1933 due to the N. R. A. program which we followed.

Q. One further question, Major, on the T. V. A.: Did you bid on any of the down river dams in the March, 1934, letting? I believe your bid shows that you bid at Norris and Sheffield; is that correct?

A. We bid for Norris and Joe Wheeler in the March letting. Those are the only two projects on which bids were asked.

Q. Now, in the October letting, did you bid on any of the down river dams?

A. No, sir.

Q. What was the reason for that?

A. We did not feel we should bid on those dams at the return we would get from the cement.

Q. Now, coming to another subject: Does the Volunteer Company sell cement at points where it meets the competition of imported cement?

A. Yes.

31699 Q. Do you know whether or not some of the dealers who sell Volunteer cement also sell imported cement?

A. I know at least one, yes.

Q. How long has that been true that that condition has existed?

A. Oh, I think, in general, ever since we have been doing business.

Q. Has your company ever adopted any policy of refusing to sell such dealers while they were selling imported cement?

A. No, sir.

Q. Has the Volunteer Company ever made any threats against its dealers who handled imported cement?

A. No, sir.

Q. Has the Volunteer Company ever threatened to boycott or has it boycotted any dealers who trade in imported cement?

A. It has not.

Trial Examiner Norwood: Now, you are speaking for the whole company and all the officials and all the salesmen?

The Witness: I would know if there was any general policy, and he spoke of a general policy.

Trial Examiner Norwood: You would know?

The Witness: Yes.

By Mr. Werle:

31700 And has your company ever adopted any policy to prevent or minimize the competition which results from imported cement?

A. No. We have adopted no policy. Of course, we did not particularly like it, but I do not know whether I got all that question clearly, or not.

Would you please read that question?

(Question read.)

A. I would say we have adopted no policy. We have, of course, endeavored to minimize it by selling our own cement.

31710 CLYDE M. ROBERTS, being called as a witness for the Respondents and being first duly sworn, testified as follows:

Direct Examination by Mr. Werle.

I am associated with Volunteer Portland Cement
31711 Company as traffic manager. I have held that position since Volunteer started in business in April, 1928 and that is the only position that I have held with Volunteer.

31713 Q. And will you tell us what the Volunteer Company's policy is as to price?

A. What their policy is?

Q. Yes.

A. Well, we are price followers and we just meet competition as we find—such competition as we find.

Q. Now, did I understand you to say that you participated in the quoting of prices by the Volunteer Company?

A. Yes, all quotations are checked by me or made up by me.

Q. Now, you mentioned being a price follower and meeting competition. How do you find out what the competitive situation is, what the competitors' prices are?

A. Through quotations which we pick up and from information which we receive from our salesmen and our customers.

Q. And how is that information communicated to the Volunteer sales office?

31714 A. Well, it is communicated by telephone, telegraph, and by person.

Q. And do any of these communications come to your attention?

A. Yes, they do.

Q. Does information concerning your competitors' prices come to the attention of your company, your sales office, from any other source?

A. No.

31715 Q. Now, as to competitive quotations which are sent in to your sales office, do they come to your attention?

A. Yes, they do.

31719 Q. Well, now, Mr. Roberts, the record shows that you do check these prices. With what do you

check to find out if they are higher than your own prices at points where you find them?

A. We have a card index file, a card index price file, and, of course, we match these quotations with that to see whether our price has changed up or down, or whether the price is higher or lower.

Q. What is the nature of that file? What does it consist of?

A. It is just a series of cards on which the price is noted, and the date of such changes, and the basing point. We keep such a card for every town of 500 population or over, in the States in which we solicit business.

Q. Who compiled that file?

A. I did.

Q. How long have you had such a file?

A. Since about 1931, I believe.

Q. Does someone keep that current, up to date?

A. Yes.

Q. Who does that?

A. I do.

Q. Now, you have said that you attempt to determine how the price is arrived at, when you find your price in the field. Will you tell us what steps you take in order to make that determination?

A. Well, we have to subtract the freight rate to determine the point upon which the price is based.

Q. And then—

A. And it takes—

Q. Go ahead. I am sorry. I did not mean to interrupt you.

A. We have to get the triangulation, so to speak, on it. You have to have several of such—that is, if it is a general price change, if it is just a price change in freight only we can usually determine that without much trouble; but if it seems to be general you have to get, you might say, a triangulation on it, you have to check several different quotations from a nearby area.

Q. Well, you mentioned deducting the freight to see the origin of price.

Have you found in all cases that changes in prices have related to some change in the base?

A. Not always, no.

Q. When you find a situation where it does not relate to some change in base, what do you do about that?

31721 A. Well, the only thing we can do in a case of that kind is to contact a customer, or have our salesmen do it, in that particular town, and we meet such prices. That is all we can do.

Q. Now, how do you—first, let me ask you whether or not there are mills in your territory that you do characterize as base mills?

A. Yes.

Q. How do you determine whether or not a competitive mill is a base mill, or not?

A. Well, if we find a number of quotations that work back to a common point, we have to assume that that point is a base point, or a base mill.

Mr. Werle: Will you mark these papers for identification, please.

(The Reporter starts to mark documents.)

Trial Examiner Norwood: Is that that you have offered to be marked there,—are those quotations picked up in the field, and office cards?

Mr. Werle: Those, Judge, are quotations picked up in the field by salesmen.

Trial Examiner Norwood: Yes.

Mr. Werle: Or sent in to the company by customers which have come to the attention of this witness, and—

Trial Examiner Norwood: Are they any different from the quotations picked up in the field by other companies?

31722

Mr. Werle: Well, I don't know what you mean by that. They are different prices, probably, and different destinations.

Trial Examiner Norwood: We have numerous ones here for illustrative purposes, and I am not going to waste any time having the Reporter mark those, unless Counsel has some special reason for doing so, or can state to me that there are differences between those and the ones that we have received.

Mr. Werle: Well, I don't know quite what Your Honor has in mind about being different. They are different in the sense they were picked up by the salesmen of this company, or sent in by customers, and came to this witness' attention, and he did certain things with them, and I want to show from them, and from certain facts and figures which appear on them, exactly what he did with them, and we are charged with—

Trial Examiner Norwood: He can tell us what he did with them.

Mr. Werle: We are charged here, Judge—

Trial Examiner Norwood: Can't you put in one sample and one sample card there?

Mr. Werle: Well, as a matter of fact, this is by no means all the quotations that this company has re-
31723 ceived at any given time, and they are samples—

Trial Examiner Norwood: Just to save time, taking time to mark them.

Mr. Werle: Well, a question of time is an important one, Judge, but I think the question of the rights of this Respondent are of far more importance.

Trial Examiner Norwood: Your rights are preserved by your exceptions.

Mr. Werle: I am certainly not doing it just for the purpose of taking up time, after all.

Trial Examiner Norwood: I didn't say that Counsel was doing that.

The Reporter: Shall I mark them or not, then, Judge?

Trial Examiner Norwood: I don't think so.

Mr. Werle: Well, I wanted to show them to the witness and ask him some questions about them, Judge.

Trial Examiner Norwood: You may do that, if they are things that he has received, you may refresh his memory about them.

Mr. Werle: I would like to have them marked.

Mr. MacIntyre: They are a matter of several dozen there.

Trial Examiner Norwood: No, we are not going to mark them.

Mr. Werle: Well, I will except to that, Your
31724 Honor please.

Trial Examiner Norwood: Yes.

Mr. Werle: And then I would like the opportunity of taking them and seeing if I can make some selection from them which would be acceptable to Your Honor.

Trial Examiner Norwood: Well, the few of them that are already marked— What have they been marked?

Mr. Werle: 2213 to 2217.

The witness identified Resp. Exs. 2213, 2214, 2215, 2216, and 2217 as quotations which came out of Volunteer's file. His "O. K." and his signature appear on the exhibits. The "O. K. Painesville" on Resp. Exs. 2213 and 2214 indi.

cates that he checked these quotations back to a base apparently established at Painesville, Ohio; the other
31725 marks on Resp. Exs. 2213, 2214 are in Mr. Parsons' handwriting.

31727 (RESP. EXS. 2213, 2214, 2215, 2216, and 2217, were offered and received in evidence.)

Q. Mr. Roberts, calling your attention to Respondents' Exhibits 2213 and 2214, have you explained what that "O. K. Painesville" means at the bottom?

A. I think I did. I stated that I had checked the freight rates back to this particular point, and that both of them arrived at a common base figure.

Q. Had you used Painesville as a base prior to May, 1931?

A. I think not.

Q. In addition to these two exhibits, Respondents' Exhibits 2213 and 2214, did you have any other knowledge as to price which may have figured back to Painesville, or was that the only information that you had?

A. We possibly have other quotations in our files.

Q. And you have merely made an effort to select some typical ones; is that correct?

A. That is correct.

31728 Q. Now, on some of those quotations, Mr. Roberts, there is a statement "our price" and then a date opposite that. Do you know what that means—for example, on this one here, Respondents' Exhibit 2213.

A. Well, this is Mr. Parsons' handwriting. It indicates that that was our current price, I assume, as of that date.

31729 (RESP. EX. 2212 was offered and received in evidence.)

Q. On Respondents' Exhibit 2212, does that note on there mean that that was your price as of the date shown on the quotation?

A. That was our price as of the date the quotation was received in our office.

Mr. Werle: Now, if Your Honor please, I would just like to have this group be given one identification number so that we have our record as to them. We won't need to take any time to go through all of them, if you will just give this group of quotations a number.

Trial Examiner Norwood: They are quotations in the field?

Mr. Werle: Yes. I am not going to offer them in view

of Your Honor's ruling, but I would like to have them marked.

31730 Trial Examiner Norwood: You may mark them as Respondents' Exhibit No. 2218-A to blank.

(The documents referred to were marked for identification "Respondents' Exhibit 2218-A to 2218-Z-2.")

Trial Examiner Norwood: You can proffer those as Respondents' Exhibits 2218-A to 2218-Z-2, and I will reject them, and you have your exception, and we can go ahead.

The witness identified Resp. Exs. 2219 and 2220
31731 as original price cards taken from the Volunteer card index file, relating to Charlottesville, Va., and Waynesboro, Va., indicating Volunteer's prices at various dates. Those destinations are shown on Resp. Exs. 2213 and 2214. These cards show Volunteer's prices as of May, 1931. He prepared these cards. These are
31733 representative of the price cards, which he testified that his company keeps and that he keeps.

(RESP. EXS. 2219 and 2220 were offered and received in evidence.)

31734 The witness identified Resp. Exs. 2221 to 2238 as a report of Volunteer's price on standard Portland cement from March 4, 1931 to date, covering representative towns near its mill, and also to points in other states in which it had done quite a volume of business. He thinks the last changes will probably show on "there". Volunteer merely picked towns within a radius of about 130 miles from its mill and also some larger cities in other states in which it had done quite a volume of busi-
31735 ness. The changes shown in these exhibits represent a typical cross section of its selling territory.

Examination on Voir Dire by Mr. MacIntyre.

Some of the price changes recorded on those papers, Resp. Exs. 2221 to 2238, resulted from changes in freight rates from basing points to the destinations shown.
31736 He cannot tell the exact dates on which these various changes occurred. He can give the approximate dates of the varions changes in freight rates. He would say that there are six or seven which reflect freight rate changes, and the rest probably reflect changes in base prices.

31738 (RESP. EXS. 2221 to 3238, inclusive, were offered and received in evidence.)

31743 By Mr. Werle:

Q. Mr. Roberts, I will show you Commission's Exhibit 978-F and G (indicating). As to 978-F, will you tell me who prepared that?

A. Yes, this is my signature, and this is my initials on it, so, evidently, I wrote this, myself.

Q. Did this reply come to your attention, Com-
31744 mission's Exhibit 978-G?

A. Probably did; I see nothing to indicate that it did, however (examining document).

Q. But that is the reply to this letter of yours?

A. Yes.

Q. Is it not?

A. Yes.

Q. Now, in the body of this letter of yours, you inquire whether the above filed price is correct or not. Will you explain what you meant by that word "correct" in that exhibit?

A. Well, I meant by that whether that was the lowest price on file or not, is what I—the wording I should have used.

Q. In that connection, did the Code Authority tell your company, or tell you, what prices you should file?

A. Not to my knowledge.

Q. When did your company stop filing prices, Mr. Roberts, with the Code Authority or with any other body?

A. At or about the time that it was declared unconstitutional, I think that is the proper wording I should use, is it?

Q. Yes, I think it was declared unconstitutional.

Do you know whether or not Volunteer filed prices with the Trade Practice Committee?

A. I don't think we did; I don't think we did.

Q. Now, there is testimony in the record, Mr. Roberts,
31745 that your company used The Cement Institute freight rate books. Can you tell us the period of time during which Volunteer has used the Institute rate books?

A. I think that we have used them almost the whole length of time that we have been in business with the exception of about two years that we were not members of the Institute.

Q. Do you personally make any use of The Cement Institute freight rate books?

A. Yes, I do, I use them.

Q. What do you use them for?

A. I use them both in figuring prices and for calculating the freight from our mill to destination.

Q. Do you use them for anything other than figuring prices, as you put it?

A. I stated that we used them for shipping purposes, too.

Q. I see.

In what way do you use them for shipping purposes?

A. Well, we use the freight rates shown there from Knoxville, Tenn., to a particular destination to which we are shipping cement.

Q. And when you say you use the rates shown, what do you mean you use them? What do you do with the rates that you find in the Institute rate book for shipping purposes?

A. What do we do with it?

Q. Yes.

A. Well, I transmit—I do not mean to say that we 31746 use these rates without checking same, I do make frequent checks.

Q. Yes.

A. From official publications to see if such rates are correct.

Q. Now, you say you took the rate out of the book. What I am trying to find out, what do you do with it, when you take it out of the book? Where do you put it?

A. Of course, that rate is given to our shipping department, who puts it on our bill-of-lading.

Q. Under what circumstances do you use the Institute rate books in connection with figuring prices?

A. Under what circumstances?

Q. Yes.

A. Well, we wouldn't use them if we had a price card covering that particular town.

Q. No, but there are occasions when you do use them, as I understood your testimony, and I would like to know on what occasions you do use them.

A. We would use them upon any occasion that we were called upon to quote a point at which we did not have a price card for that particular destination.

Q. Is that the only occasion that you would use them?
A. The only occasion, did you say?
(Last question read.)
A. (Witness makes no response.)
31747 Q. Well, I will withdraw that question; the witness does not understand it, apparently.
You said you made some check of the tariffs from time to time. Will you tell me on what occasions you made checks of the Institute rate books with the tariffs?
A. I haven't made any general check. I have just, during my spare time, I have attempted to check the rates shown in the Institute books, both from our mills and from other points, to discover any possible error.
Q. Have you discovered any errors in the Institute rate books?
A. Yes, I have discovered some few.
The witness identified Resp. Ex. 2239 as a letter which he wrote to the Cement Institute calling their at-
31748 tention to an apparent error in the freight rate from Leads, Ala., to Sandy Springs, S. C.
Q. Do you remember the circumstances that caused you to check that rate?
A. Yes, as I recall it, there was two stations on either side of town, both sides of Sandy Springs, taking a rate lower than the rate shown to Sandy Springs, which led me to believe that there was some error in the rate to this point.
Q. At or about that time did you have occasion to use this rate to Sandy Springs that you mentioned?
A. Yes, I think we used that rate in quoting on some South Carolina highway work, probably.
The witness identified Resp. Ex. 2240-A to G as a "recap" of a South Carolina Highway Department letting held February, 1934. It indicates the number of
31749 barrels on the job estimated delivery points, and Volunteer's price at these points. Sandy Springs is one of the destinations shown. The witness identified Resp. Ex. 2241 as a Volunteer quotation to the McDougal Construction Company at Atlanta, Ga. The writing "O.K., C.M.R." in the lower lefthand corner indicates that he verified the price. These are his initials and his handwriting. The writing "2.76, changed before mailing" toward the top of the exhibit indicates that he had corrected a stenographic error and that it was changed before mailing.

31750 Q. And do these exhibits show whether you used the rate which you checked in the tariff, yourself, or whether you used the Institute rate book's rate?

A. We used the rates shown in the official public tariff.

Mr. Werle: I offer them in evidence (handing to Mr. MacIntyre) Respondents' Exhibits, for identification, 2240-A to G, and 2241).

31751 (RESP. EXS. 2239, 2240-A to 2240-G, and 2241 were offered and received in evidence.)

The witness identified Resp. Ex. 2242-A and B as a letter which he had written to the Cement Institute's Freight Rate Bureau, in which he called their attention to an apparent error in freight rates to Peedee, S. C. and their reply.

A. That reply indicates that the correction had been made several months before; evidently I had overlooked it.

Mr. Werle: I offer it in evidence (handing Respondents' Exhibit, for identification, 2242-A and B to Mr. MacIntyre).

31753 The witness identified Resp. Ex. 2242 as the original letter he had received from Mr. Reigart of the Cement Institute, and the original copy from Volunteer's files.

31754 By Mr. Werle:

Q. Mr. Roberts, in connection with Respondents' Exhibit 2239, which you said was a copy of your letter addressed to the Institute Rate Bureau about Sandy Springs' rate; do you recall having received any reply to that letter?

A. I didn't find any reply when I went through our files some time recently; I didn't find any reply to this letter; evidently it has been filed some other place.

Q. Why did you notify the Institute Rate Bureau of that error?

A. Well, I assumed that they would want to correct their books.

Q. Do you know whether or not the Institute issued a supplement, correcting that rate?

A. I think they did, later.

Q. Do you know whether or not you waited until you received such a supplement or response to this letter before using the rate you checked in the official rate?

A. We did not; we used it at once, that's my recollection.

31755 Q. Mr. Roberts, on this question of using The Cement Institute's rate book, will you tell me whether or not in your experience The Cement Institute rate book does or does not give you sufficient information for billing shipments so as to secure the lowest rates?

A. In my opinion it does. It contains rates sufficient to get the shipment to a particular destination, which is about all you can do under any circumstances.

31756 Q. I am referring to the testimony in the record at pages 9594-9595, by one of the Government witnesses. Have you had any experience, Mr. Roberts, with the question of whether or not the railroad taking a shipment from your company requires any information other than the rate which you put on the bill of lading?

A. No other information is essential. It is desirable to have all the information we could get concerning the shipment.

Q. Tell me this: Are there any different rates on cement for different sizes of cars in the area in which you ship?

A. We are not affected by any such, if they exist. There is a possibility there is now or has been some intrastate rates do carry the lower minimum than what is used on interstate shipments.

Q. And as for the interstate shipments in your territory, is there any different rate depending upon the size of the car?

A. There is none in Tennessee.

Q. Now, would any minimum rates applicable on intrastate shipments of your company affect the shipments of your company?

Trial Examiner Norwood: Do you mean interstate?

31757 Mr. Werle: Intrastate. The witness mentioned that he thought there might be some minimum car weights or rates on intrastate shipments, and my question is whether, assuming that there are such, do they affect the shipments of his company.

A. No.

By Mr. Werle:

Q. Now, so far as the shipments of your company's—

Trial Examiner Norwood: Wouldn't it affect the intrastate shipments?

The Witness: There is no intrastate scale of rates in Tennessee, or minimums.

By Mr. Werle:

Q. Then, so far as shipments of your company are concerned, is there any occasion where you, as traffic manager, must give consideration to minimum carload rates, depending on the size of the car?

A. No.

Q. Now, are you able, or are you not able to bill shipments and secure the lowest rates on that shipment without knowing the routing?

A. Yes, we are.

Q. And are you able to bill shipments and secure the lowest rates on that shipment, or those shipments, without having any specific reference to any tariffs?

31758 A. Yes.

Q. Mr. Roberts, have you had any experience in shipping cement and with cement rates since you have been with the Volunteer Portland Cement Company?

31759 A. Yes, I have.

Q. I understood you to testify that that was your principal occupation in that company; is that correct?

A. I do not make out the actual bills-of-lading, but I transmit the information to our billing department, which does it,—our shipping department.

Trial Examiner Norwood: Well, do you follow through on these things so that you know whether these rates that you give them to put on their bill-of-lading are always correct?

The Witness: Yes.

By Mr. Werle:

Q. Mr. Roberts, in connection with the Examiner's question, have you had any experience as to claims with the railroads in connection with that situation; if so, tell us what your experience has been on that?

A. Yes. I have collected claims for misrouting both by myself and the carriers, and I have collected reparation claims based upon misrouting.

Q. Now, in order for you to bill shipments of the Volunteer Cement Company, and to obtain the lowest available freight rate on that shipment, do you have to

31760 have any information as to what stations are prepaid stations, is that necessary?

A. No, that is not essential. It will be called to your attention anyway by the carriers if you should happen to

bill a shipment collect which should be prepaid. They will call it to your attention and present you with a bill.

Q. Is it necessary for you to consult any tariffs to obtain that information as to prepaid stations, or how do you obtain that information if you desire it?

A. Well, you would either have to consult a tariff or call upon the carrier for such information.

Q. Will the carrier, in your experience—and will the carriers give you that information upon request?

A. Oh, yes.

Q. Now, I am referring next to the testimony of Government witnesses at pages 9061 and 9062 of the record—

31762 Q. Mr. Roberts, in your experience does the Institute rate book minimize the amount of traffic work which you have to perform as a cement shipper, or is the traffic work the same, or what is the condition as to that?

A. It is a great benefit, a great time saver, and eliminates references to a great number of tariffs.

Q. And do I understand that to mean that it does minimize your work, or does not, as a cement shipper.

A. It does minimize my work.

31763 Q. Now, Mr. Roberts, in your experience as traffic manager of the Volunteer Cement Company in shipping and billing cement, what has been your experience as to the necessity for information concerning switching charges which might or might not be available for delivery to some buyer's private siding; that information, in the first place, does not appear in the Institute rate book, does it?

A. No.

Q. Now, what is your experience as to that? Is the information necessary to you, and is the Institute book lacking from a shipping standpoint because it does not contain that information?

A. No. That information I do not consider necessary; that is, to a private or assigned siding. Such charges are universally absorbed by the last line receiving the line haul. If it is to a team track it is placed on such team track of the delivering carrier nearest the place of business.

Trial Examiner Norwood: Doesn't the switching charge add to the delivered price of the cement?

The Witness: I do not think so. If it is to a private or assigned siding, as I stated, the switching charges which may accrue at destination are universally absorbed.

By Mr. Werle:

Q. And when you say "universally absorbed,"
31764 by whom are they universally absorbed?

A. By the last carrier receiving a line haul.

Q. And are you testifying to that from your actual experience in shipping Volunteer's cement?

A. Well, I do know that we have never been presented with any bill for such switching services.

Q. Now, do you make shipments which go to points of that character; that is, where there might be some buyer's private siding involved?

A. Oh, yes, most of our shipments do go to private or assigned sidings.

Q. And in such cases in your experience how do you determine the whole transportation charge that is involved to that private siding; do you have to determine that?

A. No. We just take the freight rate shown to that particular town and use that as a basis for charges.

Trial Examiner Norwood: Well, an absorbed switching charge, that is absorbed in the freight rate, is not particularly a switching charge, is it?

The Witness: Oh, yes. There is always a switching charge at destination; that is, if the shipment is delivered to another carrier other than the one hauling it to this particular town, there is always a charge accruing to some line.

31766 By Mr. Werle:

Q. Mr. Roberts, will you tell us what a team track is?

A. Well, a team track is a track owned by some carrier designated for the receipt or delivery of carload or even less carload traffic for the use of its patrons; that is, accessible to trucks or other means of conveyances from such track to the place of business.

Q. Now, in your experience in shipping cement for the Volunteer Company, is it necessary for you to know about the availability of public team track or team track delivery at destination before you can bill a shipment or route a shipment or make a shipment?

A. You should have such information but there is no official publication from which you can procure it.

Q. Well, now, how do you handle that situation in your company?

A. We try to ascertain from our salesmen or from
31767 our customer the particular delivery he requires. If not, we merely turn it over to some carrier and direct it to the town.

Q. Well, now, just to make that clear, I want to refer to Commission's Exhibit 1110-AA, which is Tennessee Rate Book No. 3, compiled and published by the Institute Freight Rate Bureau, for example, on page 8 of this rate book, taking the first destination, shows a freight rate of 16 cents per hundredweight from Knoxville, Tenn., to Abiff, Tenn. Now, if you had occasion to bill the shipment to Abiff, Tenn., do I understand correctly you would put that rate that you find in the bill of lading?

Q. Mr. Roberts, will you look at this rate book at page 8 and tell me what you would do if you were going to make a shipment to Abiff, Tenn., in so far as the bill of lading is concerned?

31768 A. I would give this rate to our shipping department, and they would insert this rate on their bill of lading.

Q. Now, suppose your consignee at Abiff, Tenn., had a private siding which was within the normal switching limits of that town. When he takes delivery of that cement, in your experience do you know whether or not it is necessary for him to pay the shipper more than 16 cents per hundredweight?

A. We have never had a case of that kind.

Q. Are you, as a cement shipper, concerned either with respect to routing shipments or billing shipments, or as to the rate with any such additional charges as team tracks and assigned sidings and private sidings?

A. No, we are not bothered with any such charges. We like to know from a service standpoint, from a standpoint of service, which line that shipper is located upon, and we do like to direct our traffic so that it will get there without unreasonable delay.

Q. Now, is there any publication in which you can find this information as to team tracks and private sidings, or assigned sidings?

A. There is no such publication listing any team tracks, or the users thereof.

Q. Now, when you and your company made out a bill-of-lading for a shipment, have you had any occasion to

name a particular station in the town of destination
31769 to which the shipment is going? What is your practice as to that?

A. I don't believe we have run across that. I know of no towns in the South where we have shipped that have any other stations except the town, itself. I don't remember any occasion of shipping to such place.

31773 Q. Now, then, as to this period of time that your company did not receive the Institute freight rate books, I believe the record shows that your company was not a member of the Institute during that period. Do you recall that?

A. Yes, I recall that—

Q. Now, during that period that you were not a member of The Cement Institute, did you use a different method of determining prices that you quoted than you had
31774 used previously, or that you have used since?

A. We used no different methods, no.

Q. What was the source of your freight information during that period?

A. We had to depend upon the official tariffs at that time.

Q. Did you, during that period, use the official tariffs in connection with your prices and shipping?

A. We did.

Q. Do you recall whether or not during that period your prices at destination were lower or higher than the lowest price found in that destination?

A. There may have been instances when we were—when our prices were higher or lower. I don't remember any specific instance.

Q. Now, having had the experience of operating for this period without the Institute rate books, can you state, as the result of that experience, what purpose the rate books serve you and serve your company?

A. We figure that they save us a considerable sum of money; at least all of my salary would have to be applied to, or for, such purposes, if we had to depend upon assembling our own information, and possibly one or two assistants.

Q. During that period, did you give any consideration to the compilation of some similar rate book?

A. Yes, we did.

31775 Q. Did you come to any conclusion as the result of that consideration?

A. We decided that it would be cheaper to subscribe to the Institute service.

Q. Do you know what the Interstate freight rate service costs your company?

A. I don't know exactly, I think it is—I would say between two and three hundred dollars per year.

The witness identified Resp. Ex. 2244 as a memorandum prepared by him, showing the major rate changes in the Southeast, and the emergency charges prevailing at various times in the Southeast, covering the entire pe-
31776 riod from 1928 to date. The Southeastern territory includes all states south of the Ohio River and east of the Mississippi and south of the main line of the Norfolk and Western Railway from Bristol to Norfolk. It cuts the State of Virginia in half approximately; everything below that is south as to freight territory. The changes and the emergency charges shown on Resp. Ex. 2244 were published before they became effective.

31784 (RESP. EX. 2244 was offered and received in evidence.)

By Mr. Werle:

Q. Mr. Roberts, calling your attention to Respondents' Exhibit 2244, this change of March 28, 1938, will you explain what that means in simple language?

A. I will try to. I do not know whether you will understand me or not. This increase of March 28, 1938,
31785 merely supplements an increase which was applied November 15, 1937. November 15, 1937, the carriers were granted a flat increase of 1 cent per hundred pounds on cement regardless of the previous rate. The increase was 1 cent flat.

On March 28, 1938, they granted the increase of 10 percent to all existing freight rates prior to November, 1937, without making any reductions to the rate which had been increased 1 cent per hundred pounds in November, 1937. No reductions were made; further increases were made up to a maximum of 10 percent.

Is that clear?

Q. I think so. Yes. It answers my question, anyway.

Now, as to this change on November 1, 1939, you refer to the realignment of stations and grouping. What does that mean?

A. As a rule rates are not named in any cement tariffs except to the larger stations. Rates to the smaller stations

or towns are made by basing them upon a larger town. We have what is known as the Southern rate basis, which gave every town a certain group. I think this was possibly made on a 10-mile scale, that is, the station within 10 miles of either side of a larger town would take the same rate as to the larger town.

Q. Is that what is meant by realignment?

A. Realignment, yes. In November, 1938, they issued a new publication called the Southern Group Basis,
31786 which apparently spread this scale out, instead of being 10 miles they spread it out to, apparently, about 20 miles on either side of the large town, increasing the base or the basing area, you might say.

Q. Now, then, as to this emergency charge which was in effect from January 4, 1932, to September 30, 1933, will you explain what that "subject to a maximum of 10 percent of the line haul transportation charge" means?

31788 A. That means exactly what it says, that in no case could the rates exceed or the emergency charge
31789 rates exceed or the emergency charge exceed 10 percent of the charges, that was the maximum.

By Mr. Werle:

Q. The emergency charge, however, am I correct in understanding that it was applicable to all rates, whether they were line haul or otherwise?

A. As a maximum, yes.

Q. Then, I think that is sufficient on this.

Now, Mr. Roberts, as to each of these changes, how do you determine or how did you determine at the time what hauls were subject to these changes?

A. Well, all hauls were subject to the changes.

A. Well, all hauls were subject to the changes.

Q. All right. That is an answer.

Now, was it necessary to make some computation in order to determine what rate was applicable in the case of applying these emergency and other changes?

A. Oh, yes, you would have to calculate the amounts of such increases or decreases.

Q. And will you tell me whether or not The Cement Institute Rate Bureau issued notices of these changes which appear on this Respondents' Exhibit 2244?

A. That is my recollection that they did.

Q. And in what form was the notice of the Institute?

A. In the forms of supplements or correction notes to their books.

31790 Q. What I have in mind is whether or not having the Institute notice you still had to make the computations or whether in some way or other the Institute had provided computations?

A. I think the Institute did provide certain tables to be used in connection with the various increases.

Q. And those tables were based on what, do you know?

A. They were copied from the supplements to the railroad tariffs.

The witness identified Resp. Ex. 2245 A-E as letters which he wrote to the Cement Institute Freight Rate Bureau and their replies, in which he called attention to certain apparent errors in their freight rate books.

31791 (RESP. EX. 2245-A to 2245-E were offered and received in evidence.)

Q. Now, Mr. Roberts, you testified earlier this afternoon that you had found some apparent errors in The Cement Institute rate book, and I call your attention now to Respondents' Exhibit 2239, 2242-A and B, 2243-A and B, and Respondents' Exhibit 2245-A to E, and ask you whether or not those exhibits represent the errors which you,—the apparent errors which you thought you had found in The Cement Institute rate books?

A. Yes, they do.

Q. And do you recall whether or not you found any other errors, other than the ones mentioned in those exhibits?

A. There were possibly others. I do not recall any others.

Q. And were you able to find any record of any such letters as to others in your files?

A. I think there is one in connection with an exhibit that has been offered.

Q. Yes, there is. That is true.

A. But I am not sure.

Q. In addition to any that we have discussed here this afternoon.

31792 A. No, I do not recall any more.

Q. Now, Mr. Roberts, do you have occasion to use land-grant rates in your business?

A. Yes, we do.

Q. What was your first experience with land-grant rates?

A. When I came with this company I knew very little about land-grant rates. I had never come in contact with them, no experience with the railroad; but my superior, Mr. Parsons, asked me what I did know about them, and I told him very little, and he says, "Well, you better"—

Trial Examiner Norwood: Tell us what you know now about it.

The Witness: Beg pardon?

Trial Examiner Norwood: Tell us what you know, now, about it.

The Witness: I am familiar with the procedure upon which land-grant rates are constructed.

Trial Examiner Norwood: And you have figured them out a great deal in the course of your duties?

The Witness: I have; yes, sir.

By Mr. Werle:

Q. Well, as I understand you, your first experience with land-grant rates was in 1928 when you came with the company; is that correct?

A. Shortly after that, I think.

31793 Q. And have you taken steps to familiarize yourself with the rates, land-grant rates?

A. Yes, I have.

Q. Tell us what you did. How did you go about that?

A. Well, the biggest drawback is securing divisions to the commercial rate from the carriers. We have been furnished with the various divisions, however, on occasion.

Q. Well, my question was what you did to familiarize yourself with the rates, and what steps did you take to find out? Did you consult with any carriers, for example?

A. Oh, yes; yes. I consulted with—

Q. Well, with whom did you consult with the carriers and what was the nature of the information you obtained?

A. I consulted with several rate men, both the Southern and L. & N. Railroad at Knoxville, and I also made trips to Atlanta and consulted the men who worked up this information for the Southern Railroad.

Q. Did they explain to you about land-grant rates and how they figured them, and so on?

A. Yes, they did.

Q. Did you find anyone connected with any of these carriers, whom you consulted, reluctant to give you information about that?

A. No.

Trial Examiner Norwood: Was that with respect
31794 to particular rates or with respect to the data and information from which you could figure out the rate?

The Witness: That was with respect to data and information for figuring any rate.

The witness identified Resp. Ex. 2246 as a letter written by him, to which he signed Mr. Parson's name. It was sent to the assistant general freight agent of the Southern Railway at Knoxville, asking for divisions
31795 to the commercial rates to certain points. He identified Resp. Ex. 2247 as the reply giving the requested information.

31797 Washington, D. C.,
January 31, 1940.

31801 CLYDE M. ROBERTS thereupon resumed the stand and testified further as follows:

Direct Examination (Continued).

31802 Mr. MacIntyre: We object to Respondents' Exhibit 2247-A and B on the ground that it is written by, or purports to be written by a gentleman by the name of A. T. Martin, who is not called as a witness or sub-
31803 jected to cross-examination. We cannot determine from this witness exactly what Mr. Martin had in mind in submitting the tabulation as to whether Mr. Martin considered it to be in fact the information that would disclose the division sheets. This witness probably considered it to so be, but whether the man who submitted it considered it to be information fully disclosing and accurately disclosing division sheet information, this man cannot testify. The writer of the letter can only tell us that, and the reason we do not believe that the information is as this witness probably believes it to be, because there is an order of the Interstate Commerce Commission against railroads turning over to private parties the information such as Respondents' Exhibit 2246 asked for. Of course, the Respondents here probably claim 2247 gives the information 2246 asked for, but we do not know until the man who

wrote the letter is called to tell us whether or not that is the information such as 2246 asked for. It is probable his explanation would qualify it to some degree, but we do not have him, we have no opportunity to cross-examine him on it. It is incompetent and hearsay in the form presented.

31806 Trial Examiner Norwood: Now, you wrote this letter here, dated June 27, 1928, to the address named here, Mr. I. L. Graves, Southern Railway Company, Knoxville, Tenn., A. G. F. A. What is that?

The Witness: Assistant General Freight Agent.

Trial Examiner Norwood: Freight Agent; and you received in due course of the mails in reply thereto this letter dated August 22d.

The Witness: I did.

Trial Examiner Norwood: He waited some time to give it to you, didn't he?

The Witness: He had to get authority from his superiors at Washington.

Trial Examiner Norwood: I shall overrule the
31807 objection and receive the exhibits as marked, not to show that these are the actual rates but to show that that official did send them some information.

(RESP. EXS. 2246, 2247-A, 2247-B, were offered and received in evidence.)

By Mr. Werle:

Q. Mr. Roberts, do you understand these provisions which appear on Respondents Exhibit 2247-A, in the third column, and, if you do, will you tell us what those abbreviations stand for?

31808 A. This shows the divisions from Birmingham, Ala., to Memphis, Tenn.

Q. I have reference to this column, A. G. S. M. & O.

A. A. G. S., that is the Alabama-Great Southern Railroad, 35 percent. M. & O., Mobile & Ohio Railroad, 65 percent.

Q. Is there any other?

A. This is by another route here, A. G. S. 32 percent, Southern, 68 percent.

Q. And then there are two other abbreviations, one is I. C. What is that, if you know?

A. Illinois Central.

Q. And "Byd"?

A. That is "beyond."

Q. Are those provisions, or are they not, terms that are customarily used among railroad people,—generally understood?

31809 A. That is correct.

Q. Now, you mentioned these percentages on here. What do you understand those to be in response to your letter?

A. I understood that to be the information I requested by which I could split up a true commercial rate.

Q. And did you use this information, Mr. Roberts?

A. I do not know whether we had occasion to use it or not, but I certainly would use it if necessary.

Q. Well, now—

Trial Examiner Norwood: Did you ever check it? In your competition of prices, did you ever check it and find that it is correct?

The Witness: I don't remember whether we had occasion to use it in connection with any bids, or not.

Trial Examiner Norwood: Did it conform—did it check with the rates in the Institute rate books?

The Witness: This does not refer to any rate,—any commercial rate.

Trial Examiner Norwood: Does the Institute book give you some land grants there?

The Witness: No, sir.

By Mr. Werle:

Q. Well, just explain, Mr. Roberts, in your own words what this means: "Memphis to Tuscaloosa, A. G. S."?

31810 The Witness: I understand that to be the proportion which will accrue to that particular carrier.

Trial Examiner Norwood: Yes.

By Mr. Werle:

Q. The proportion of what?

A. Of the through commercial rate.

Q. And having this information could you determine the land-grant rate from Birmingham to Memphis and to Tuscaloosa and to these points mentioned?

A. I could.

Trial Examiner Norwood: Well, the land-grant rate is a reduced rate?

The Witness: Yes.

Trial Examiner Norwood: And to apply the percentage to the commercial rate would that give the divisions as between the railroads?

The Witness: All land-grant rates are based upon the commercial rates. That term "land-grant rate" is probably a misnomer; the proper term is "land-grant
31811 deductions."

Trial Examiner Norwood: But do you mean, then, that from the commercial rate, then, for that particular railroad that is listed on top there, you would deduct the 35 percent—

The Witness: No.

Trial Examiner Norwood: —of the proportion of the commercial rate that is determined by the proportion of the mileage you had; is that right?

The Witness: No, your deductions are made from the War Department's circular which contains certain percentage to be applied.

Trial Examiner Norwood: Go ahead.

Q. You mentioned a War Department circular of percentages. Did you make an effort to get that circular?

A. I did.

The witness identified Resp. Ex. 2248 as relating
31812 to "obtaining that". He wrote the letter. He identified Resp. Ex. 2249 as the reply he had received in due course; Resp. Ex. 2250 as a circular published by the Quartermaster General of the U. S.
31813 Army, sent in reply to his letter, and included with Resp. Ex. 2249. He made certain red marks, crosses and lines, also certain pencil notations on various pages of Resp. Ex. 2250. They indicate which percentages Volunteer might have occasion to use. He used the booklet.

31818 (RESP. EXS. 2248, 2249 and 2250 were offered and received in evidence.)

31820 Q. Will you state what that notation means that you put on there?

A. "Percentages shown herein on 50 percent land-grant roads are one-half commercial percentages."

Q. What does that mean?

A. That means that the carriers get one-half, and the Government gets one-half of—

Q. On all of the percentages shown in this book; is that it (indicating Respondents' Exhibit 2250)?

A. This is incorrect as to all of the percentages. There

may be some shown in book which are not 50%, but all of the Southern lines which we have occasion to use are 50%. (Answer substantially correct.)

Q. Now, Mr. Roberts, in addition to receiving this circular of percentages, did you receive any other information from the United States Government about these land-grant rates?

A. I received a map showing the land-grant and bond-aided carriers of the United States.

Q. Now, have you from time to time been
31821 able to secure information as to land-grant division from the railroads in the South, since 1928?

A. Yes.

Q. Have there also been instances where you have been unable to get that information from the railroad, in that period?

A. I wouldn't say that there had been instances where I couldn't procure it.

Q. As to the divisions that I have reference to?

A. Yes.

The witness identified Resp. Ex. 2251 A, as a letter he wrote to the Division Freight Agent of the L. & N. Railroad at Knoxville, Tenn., asking if they could furnish Volunteer with land grant rates upon request;
31822 Resp. Ex. 2251 B and C as the L. & N. Railroad's reply in due course in answer to Resp. Ex. 2251 A.

(RESP. EX. 2251-A, B and C were offered and received in evidence.)

31823 The witness identified Resp. Exs. 2252, 2253 and 2254 as further correspondence that he had had in due course with the Southern Railroad about obtaining land grant information. He wrote and prepared Resp.
31824 Ex. 2252. Resp. Exs. 2253 and 2254 were the answers he received, one supplementing the other.

Mr. Werle: If Your Honor please, I offer in evidence at this time Respondents' Exhibits 2252, 2253, and 2254 (handing documents to Mr. MacIntyre).

Mr. MacIntyre: Your Honor please, we object to Respondents' Exhibits 2252, 2253, and 2254, as incompetent, irrelevant, and immaterial.

I want to call your attention to Respondents' Exhibit 2253. It merely says—that is, the writer that is not here, states in the letter that he feels sure that a certain office can furnish division sheets upon request. In other words,

he is expressing an opinion. He does not know, and that is just what we are getting in the record, is incompetent evidence through such letters as this, and it will be argued later in a brief that they are factual statements. They are not worth the time taking up the hearing with them, as I can see.

31825 Trial Examiner Norwood: I think that Counsel for the Commission is right about this. I do not think there is any information in these three exhibits throwing any light on this situation.

Trial Examiner Norwood: Why can't you do that without those letters as well as with them? He can re-
31826 fresh his memory from that. If that appears necessary to explain the witness' testimony later on, why, I shall consider that, but for the time being I shall sustain the objection.

By Mr. Werle:

Mr. Roberts, as a result of receiving Respondents' Exhibit 2254, for identification, did you go to Mr. Boden-
31827 stine's office of the Southern Railroad in Atlanta?

A. I did.

Q. Did you have any discussion with anyone there about this question of land-grant information?

A. I did.

Q. Who did you see there, do you recall?

A. I do not remember the name of the party. I talked to several men, in fact, in that office.

Q. Can you fix the date of that? Will this help to refresh your recollection as to the date. (handing document to the witness)?

A. It was shortly after I received this letter.

Q. That is, shortly after January of 1933?

A. Yes, sir.

Q. January 16, 1933?

A. Yes.

Q. Now, what was the information that you had at that office as to whether or not you could get this land-grant information?

31828 Q. I believe you have already testified, Mr. Roberts, that you have computed and worked out land-grant rates yourself; is that correct?

A. I have.

Q. Now, to what extent have you relied upon your own

computations of land-grant rates for purposes of quoting the United States Government?

A. I do not know as to that. We would rather have rates from the railroads rather than depend upon our own computations.

Q. Well, my question is, when have you used your own computations, if you have used your own computations? What do you do?

A. I cannot recall any specific instance where I did use it.

Q. Now, since 1932, which is the latest date in this correspondence we have had, has there ever been any occasion where you have not been able to secure the land-grant rates, either from the railroad or from some Government source?

A. No.

Q. What has been your experience, Mr. Roberts, as to the likelihood and frequent changes in fluctuations in
31829 land-grant percentages which would cause changes in the rates?

A. There is very little change in the percentages. Any change in the commercial rate would change your land-grant rate, also.

Q. But as for the percentages?

A. As for the percentages and dividends, they remain fairly constant.

Q. In the southeastern territory which you described for us yesterday, has there been in the past 10 years a reconstruction of railroads, or rearranging of railroad lines?

A. Very little reconstruction; a number of lines discontinued.

Q. Yes; but I have reference to reconstructing the line, or something of that kind.

A. No.

31830 Q. Well, can you answer my question in the light of the Judge's statement, Mr. Roberts?

A. I do not think that there has been any changes, which would affect the land-grant mileages.

Q. Now, has any railroad in your area that you do business with ever refused to give you land-grant rates?

A. No.

31831 Q. And from what railroads have you received information on land-grant rates?

A. From the Louisville & Nashville, the Southern, the Illinois Central, and the Central of Georgia.

Q. Now, what is your method of obtaining that information normally? Do you do it by correspondence with the railroad, or do you do it some other way, or what?

A. No, I call upon the nearest traffic officer of that particular line, carrier.

Q. And how long have you been obtaining your information and customarily in that manner?

A. Oh, for several years, possibly seven or eight.

Q. And when you obtained the information, in what form did you keep it?

A. I kept a pencil memorandum of such rates as were quoted me.

Q. And what has been your experience through the years with respect to retaining those memoranda?

A. I do not retain them after a change has been made in the rate structure; that is, commercial rates, because they are of no further benefit.

31832 Q. Mr. Roberts, I show you Respondents' Exhibit 225-A to Z-33, for identification, and ask you to state what that is (handing documents to witness)?

A. These are land-grant rates which I received from various carriers and which I used in constructing our prices.

Q. What period do those cover?

A. This is—I don't know what period—it starts with January 1, 1937, I think.

Q. Does that exhibit represent the manner in which you have already testified you kept these land-grant rates?

A. Yes.

Q. Do you have any such memoranda still available prior to the date of these?

A. Nothing prior to January, 1937.

Q. Why do you have none prior to this date?

A. Because on January 1, 1937, the emergency charge which had been in effect was discontinued, and any such rates were useless after that date.

Q. Now, you testified that it was your practice to 31833 keep such memoranda until there had been some change, in which case you would begin a new set. Has there has been any change in the rates since January 1, 1937?

A. Yes, several.

Q. And has that affected some of the rates which appear in these memoranda?

A. Yes.

Q. And why is it, then, that your practice of getting rid of these as rates changed was not followed in this instance, in connection with these?

A. I don't know why. I retained those for some time, and after this proceeding started we have not destroyed anything. We would not have retained them, otherwise.

Q. And you said you have used these in constructing your prices where land-grant rates were involved?

A. That's correct.

31838 (RESP. EX. 2255-A to 2255-Z 33 was offered and received in evidence.)

By Mr. Werle:

Q. Mr. Roberts, will you tell me whether or not the date on which you received the information noted on each of those sheets is indicated on the sheets?

A. I think in almost every instance it is.

Q. Is the source of the information you received indicated on the sheets?

31839 A. It is.

Q. Is the person from whom you obtained the information indicated on all or on some of the sheets?

A. It is.

Q. Who were those persons, please?

A. Mr. Winstead is chief clerk to the assistant freight traffic manager of the Southern Railway at Knoxville; Mr. Carson, whose name appears here, is chief clerk to the division freight agent of the Louisville & Nashville Railway at Knoxville.

Q. And do their names appear in these pencil memoranda?

A. Yes.

Q. Now, will you please look at Respondents' Exhibit 2255-B, which has a heading at the top, "Dadeville, Ala." (indicating). Will you just explain what that means, so that we understand these notations?

A. This indicates land-grant rates are received on the Southern Railway on Leeds and Boyles to Dadeville, Ala.

Q. And the pencil figures preceded by the decimal, what are they?

A. That indicates a multiplication by the weight of a

barrel of cement, and the base price added to such computation.

Mr. MacIntyre: Your Honor please, we object to further questions on this line as to these details,—just spinning the thing out unnecessarily as to the immaterial de-
31840 tails. It is not meeting any issue; it is just a matter of taking time.

Trial Examiner Norwood: Well, if he—

Does this illustrate the method that you employed prior to 1937?

31841 The Witness: It illustrates the methods that we used prior to 1937, yes.

Trial Examiner Norwood: How long prior?

The Witness: Well, from, I would say, 1930 or 1931.

Trial Examiner Norwood: Yes.

The objection is overruled.

By Mr. Werle:

Q. With respect to Respondents' Exhibit 2255-B, which is the one we are talking about, in response to Mr. MacIntyre it is dated February 15, 1937, and this complaint was filed in July of 1937.

Now, there is a computation in pencil in the lower right-hand corner of this Respondents' Exhibit 2255-B; will you explain that computation so that we will understand what it is (indicating)?

A. We take the freight rate as furnished us by the carriers, and multiply by 380 pounds, which is the weight of a barrel of cement. That gives us our per-barrel rate to which we add the base price which we have established; it gives us our price which we quote to the Government.

Q. Now, on Respondents' Exhibit 2255-C, I believe, you also show Dadeville, Ala., and as to that, if I understand your testimony, the name Carson means you obtained that from Mr. Carson, of the L. & N. Railroad; is that correct?

A. That is correct.

31842 Q. Now, that shows a different figure from the figure shown on Respondents' Exhibit 2255-B; what is the explanation for that?

A. The explanation is we received rates from different sources and we used the lowest one which we had thus obtained.

Q. Do you know, of your own knowledge, how this difference in that rate comes about, from the two railroads?

A. Yes, that's a difference in mileage and the carriers involved.

Q. I see.

Now, did you use—do I understand your testimony to mean that you used this information in connection with some bid that appears on A and B?

A. Apparently we did.

Q. And which information did you use,—the information appearing on sheet A, or the information appearing on sheet B (having reference to Respondents' Exhibit 2255)?

A. The information on sheet A—or sheet B—this is numbered B and C.

Q. Oh, I am sorry.

Do you have any practice as to that, where you receive differing information from two railroads, where the haul is different?

A. We use the lowest rate we can obtain in any case.

31843 Q. Now, then, as to Respondents' Exhibit 2255-D, there also appear to be—I will try to shorten this—appear to be two different land-grant rates stated on that sheet (indicating). Can you tell me which of those you used in that instance?

A. I have two rates indicated here, and we used the lower of the two.

Trial Examiner Norwood: Well, why did you use the lower?

The Witness: Because we felt that our competition would do likewise, that we wouldn't be competitive unless we did.

By Mr. Werle:

Q. Now, on Respondents' Exhibit 2255-E, there is a note "Boyles 828 U. S. Gov't," what does that mean?

A. That indicates that this rate came from some Government source.

Q. What have been your Government sources?

A. Abstract of bids taken after a letting; that is usually.

Q. Now, also on that same exhibit there is a figure "D. C.—2.21" and then three digits crossed out after that. What is the reason for that?

A. The "D. C." indicates destination cost which we

were using at that time. I dropped the fractions beyond two decimals.

Q. What was your reason for doing that?

A. Because we found that our competition was doing likewise.

31844 Trial Examiner Norwood: You dropped it regardless of the size of the second decimal?

The Witness: Yes, we did.

By Mr. Werle:

Q. Now, then, Mr. Roberts, Respondents' Exhibit 2255-K and L (indicating), and they are each sheets headed "Fort Bennings Junction, Ga.," and there are two sets of figures given on these sheets (indicating).

Will you explain why that is and what that means?

A. These two sheets represent rates received of different carriers.

Q. Did you follow your usual practice in that situation?

A. Yes, we used the lowest rate we obtained.

Q. Now, then, on Respondents' Exhibit 2255-P, I believe that's the one that Mr. MacIntyre was asking you about, there are crosses on the sheet, and on Respondents' Exhibit 2255-O there are other figures for the same destination, Dadeville, and the dates are several months apart (indicating).

Can you explain that for us?

A. The first date shown indicates we used the information we had at that time. The later date indicates we received additional information, or later information, and used it, rejecting the other, as that being useless.

Mr. MacIntyre: We are talking about dates. Do the exhibits carry the dates in each instance?

31845 Trial Examiner Norwood: He is referring to dates on the exhibits.

By Mr. Werle:

Q. I think that—

A. The principal reason in this case is, we received an official Government rate later, and, therefore, we canceled our railroad information as being useless.

Q. Do you have a practice in that respect?

A. Yes, we use the Government rates, where available, in preference to any other.

Q. Well, then, on Respondents' Exhibit 2255-X is a term appearing there which I do not believe has appeared

on previous ones. "D. C. $2.46, paper cost extended." Will you explain that, please?

A. This is a rate we used—this is a commercial rate we used, not a land-grant rate, in which we made our extensions at 380 pounds per barrel and dropped the fractions, resulting in an even figure. We found that our competition were doing that.

Q. Now, as to—

Mr. Paulson: What number was that, please?

Mr. Werle: That is Respondents' Exhibit 2255-X.

By Mr. Werle:

Q. Was that same explanation—does that apply to Respondents' Exhibit 2255-Z-2?

A. Yes.

31846 Q. Where you also have the note "extended"?

A. Yes.

Q. And this "COM", what does that refer to?

A. That indicates our commercial price at destination.

Q. Is that so as to all of these?

A. Yes.

Q. Now, then, Respondents' Exhibit 2255-Z-28, Z-29, and Z-30 have a series of computations referring to the destination Taswell, Tenn. Two of these pages are crossed out. Will you explain that, please?

A. The first one, dated January 25, 1937, indicates that we did not use a land-grant rate, but a cost extended price based upon commercial rate. On June 15, 1937, I secured some land-grant rates to the destinations which were evidently used. The only explanation I can offer is that on this first bid we probably found that we were too high, and on the next one that we secured further information.

Q. Now, there was a period, as I understand it, when you used or received from The Cement Institute information concerning land-grant rates. What was your practice as to the rate, land-grant rate, you would use during the period you were receiving that information?

A. Our practice has always been to use the lowest rate we can obtain.

Q. Did you understand that all the Respondents

31847 who received the Institute land-grant rate service would use the lowest rate which appeared thereon, or would use any rate which appeared in that service in quoting prices?

A. We did not understand that; we merely assumed that they would use the lowest rate.

Q. Why did you assume that?

A. That would seem to me to be a natural reaction, to use the lowest rate you could find.

Q. Now, then, there has been some reference to a control clause. Did your company use such a clause?

A. Yes, we have.

Q. Are you familiar with its operation?

A. Yes.

Q. Will you state whether or not in your experience that your use of the control clause has deprived the Government of the benefit of land-grant rates which were available to it?

A. We do not think so. We have taken what we consider the land-grant rate—we have taken the land-grant rate into consideration in constructing our price.

Trial Examiner Norwood: And now that is the invariable rule?

The Witness: Sir?

Trial Examiner Norwood: Is that the invariable rule?

The Witness: Yes, sir.

Trial Examiner Norwood: Then the control
31848 clause permits the land-grant rate to be deducted; is that right?

The Witness: It permits the lowest rate to be deducted.

Trial Examiner Norwood: Yes, land-grant, or lower.

The Witness: Yes.

Trial Examiner Norwood: Well, if there were a lower rate than the land-grant would you base the price out of that?

The Witness: Well, there could not be a lower rate than the land—

Trial Examiner Norwood: If there were.

The Witness: Oh, undoubtedly we would.

Trial Examiner Norwood: The control clause assumes that there could be a lower rate. Within every instance, then, would you base it on this lower rate, if any?

The Witness: Oh, yes. We would construct our price upon the low rate.

The witness identified Resp. Ex. 2256-A and B
31849 as a compilation which he made several years ago, indicating the tariffs Volunteer would need in figuring its own rates and it is part of a survey which Vol-

unteer made as part of the cost of developing or using its own rate service. He prepared this himself and it was used in determining the question of Volunteer's cost of preparing its own service. It went to his superior who arrived at a conclusion.

Examination on Voir Dire by Mr. Paulson.

By Mr. Paulson:

Q. Mr. Roberts, do I understand you to say you had to have all this information if you were to compute shipping rates, yourself, all of the information shown on this Respondents' Exhibit 2256-A and B?

A. Not shipping rates, I don't think I said.

Q. What is the fact? Do you have to have all these charts that are listed here, all this information that is listed here to properly handle your traffic work?

A. Some of the tariffs might not be necessary, but we should use more or less all of those tariffs, yes.

Q. Now, you made a correction to my former
31850 question about shipping purposes. What else are you concerned with besides rates for shipping purposes?

A. With prices.

Q. Oh, you had to have some of these to quote prices?

A. Yes, we would need some of those to quote prices.

Q. Which ones did you have to have for shipping purposes?

A. Only the ones carrying rates from our mill.

Q. Oh, well, then how many would that be?

31852 The Witness: We would only need possibly one tariff for shipping purposes.

By Mr. Paulson:

Q. Which one?

A. The Southern Cement Tariff.

31853 (RESP. EX. 2256-A and 2256-B was offered and received in evidence.)

Direct Examination by Mr. Werle (Continued).

Q. Just so the record may state, Mr. Roberts, there have been questions here about what you need all of these tariffs for. Will you tell me whether or not if you

31854 had no Institute rate book you would need these tariffs in the operation of your department with the Volunteer Company?

A. Yes. We would need practically all those tariffs.

31855 The witness identified Resp. Exs. 2258 to 2273 as freight tariffs necessary to check the freight rates to points in Virginia from the deadline points shown in the Institute book for Virginia. Volunteer sells in Virginia and has been during the whole period of its operations. The witness identified Resp. Ex. 2257 as the current Cement Institute freight rate book for the State of Virginia.

Q. Now, Mr. Roberts, will you tell me whether or not in selling cement in the State of Virginia it is of any interest or of any necessity to you to know the freight rates from mills which ship into the State of Virginia?

A. Yes, it is.

31856 Q. Will you look at the first page of this Respond. ents' Exhibit 2257 (indicating), and I will direct your attention to the first destination in there—well, make it the second destination—Abilene, since you have done this for me for the first one we will take a new one—and will you take each of these points and with the use of these Virginia tariffs which we have identified check the rates to Abilene, Va., from each of those points?

Mr. Paulson: I object. What is this all about? To demonstrate that this man knows how to look at a tariff?

31863 Trial Examiner Norwood: Now, I shall sustain the objection to that.

Q. As to the convenience and time consumption, Mr. Roberts, can you state with any reasonable accuracy

31864 the approximate time it would take you to check each of the rates shown in this Institute rate book from these shipping points to one destination, with the use of these Virginia tariffs?

A. To check all of those tariffs, and the effective supplements, would take a considerable length of time, certainly not less than two hours,—approximately from two hours to half a day.

Trial Examiner Norwood: And you have them all on one line there, in the rate book?

The Witness: Yes.

Trial Examiner Norwood: Is that right?

The Witness: Yes.

Trial Examiner Norwood: Now, would that checking be necessary if you used those books only in shipping?

The Witness: No, it wouldn't—you wouldn't have to use all of the tariffs, no.

Trial Examiner Norwood: What tariffs would you use?

The Witness: You would only use one, or not more than two, to a particular destination.

Trial Examiner Norwood: Well, how long would that take?

The Witness: Oh, that would possibly require
31865 from half an hour to an hour to check the effective supplements—and the tariffs.

By Mr. Werle:

Q. Mr. Roberts, yesterday I called your attention to certain Commission exhibits, 408-B, 408-C, 408-F, 408-G, and 410, which purported to be filings made by your company, among others, with the Code Authority.

Will you look at the points in those exhibits where it shows that your company filed a price, and tell us how you determined the price that you filed in each of those instances (referring witness to documents)?

A. These prices which were filed here are taken from our price card files.

Q. Can you tell me how you are able to state that, Mr. Roberts?

A. Well, I note the State of Florida here. We evidently only filed one price. This was for the City of Jack-
31866 sonville. That is the only card we have. We may possibly have two, now, in that particular State.

Q. And as to the others (referring witness to documents)?

A. The others—they appear to be the larger towns in a State, and we have price cards covering all of the points I see here.

That is as far as I have checked.

31867 The witness identified Resp. Exs. 2274 to 2279-A and B as photostat copies of all of Volunteer's contract forms used from 1928 to date. Certain parts
31868 are marked out on some and cut out on others. The reason for that is that these are forms which had actually been used as contracts, and he scratched off or X'd out the name of the party appearing thereon as Volunteer did not feel it was necessary to bring their name

into this proceeding. This was done because Volunteer had no blank forms left.

31875 (RESP. EXS. 2274, 2275, 2276, 2277, 2278, and 2279-A and 2279-B were offered and received in evidence.)

Q. Mr. Roberts, I would like to call your attention to Commission's Exhibit 1090-C, which purports to show prices bid to the United States Navy Department opened on June 6, 1933, and refers to a price quoted by the Volunteer Company, and in connection with that I would like to have these papers marked as Respondents' exhibits.

(The documents referred to were marked for identification "Respondents' Exhibits 2280-A to 2280-K.")

The witness identified Resp. Ex. 2280-A to K as a
31876 copy of Volunteer's bid to the Navy Department. He prepared this bid and his initials appear on the front of this exhibit.

Q. And does this show all of the terms and all of the conditions of your price as it was bid?

A. Evidently this copy here was not completely filled in, but—

Q. But as to your price and terms, is it completely filled in?

A. No, the terms of sale are not filled in; I assume they were on the bid that went in.

Q. I see.

A. This copy doesn't indicate the terms upon which it was sold.

Q. Now, this abstract shows that bids were called for at a number of destinations, and that your company only bid at Charleston, S. C. Can you explain that, Mr. Roberts (indicating)?

A. We do not normally solicit business at any of the other points asked for in the invitation.

Q. And is that the reason you did not bid at those other points?

31877 A. I assume that it was.

31878 The witness identified Resp. Ex. 2281-A and B as cards taken from Volunteer's price index file covering the town of Charleston, S. C. These cards were used in the preparation of this bid.

31881 (RESP. EXS. 2280-A to 2280-K, and 2281-A and 2281-B, were offered received in evidence.)

By Mr. Werle:

31882 Q. Mr. Roberts, did you make any effort,—your company, I mean,—to withdraw this bid when you discovered that it was low?

A. I don't think so.

Trial Examiner Norwood: Do you know about the circumstances? Do you know whether or not they did or whether they did not?

The Witness: No, we got the business, that's all I know.

Q. Mr. Roberts, I would like to call your attention to Commission's Exhibit 1099-D, which is another abstract of prices bid to the United States Navy Department on June 26, 1934 (showing document to witness).

The witness identified Resp. Ex. 2282 A to J as a bid of his company on the Navy Department letting of June, 1934. He prepared that bid. This is a complete copy of the bid which he submitted on that invitation and all the markings are his on this copy.

31883 Q. And this indicates it was during the Code period. Can you tell me what your practice was as to determining the price you would bid at that time? Was there any difference, or was it the same as what you had done on the previous bid?

A. No difference.

Q. And with Respondents' Exhibit 2281-A and B, will that show whether or not you bid your commercial price on this invitation (indicating)?

A. If that's the way the bids were requested, this card will reflect such prices.

31884 Trial Examiner Norwood: Did you take into consideration any filed prices—prices filed with the Code Authority?

The Witness: We didn't take them into consideration, no. We quoted from our prices, which prices had been filed, of course.

31885 (RESP. EX. 2282-A to 2282-J, was offered and received in evidence.)

By Mr. Werle:

Q. Now, I want to call your attention, Mr. Roberts, to another Commission's exhibit, Commission's Exhibit 11, which purports to be a tabulation of bids to the North Carolina Highway Department, in February of 1936, and also to Commission's Exhibit 3079-F to J, which purports

to be a copy of the bid of your company on this North Carolina letting (showing document to witness).

Now, will you refer to page 1 of this Commission's Exhibit 3079, and tell me if you know what the matter which appears to be X'd out on that page is, and what was the purpose of X'ing it out.

A. Well, it appears that they asked for prices f.o.b. certain mill points, or certain basing points, it appears. We did not feel like bidding another manufacturer's base point or price, as the case might be.

Q. Now, as to Commission's Exhibit 3079-H, can you tell me what the basis for selecting the destinations which appear on that page?

A. These appear to be county seats or largest towns in the State of North Carolina, and they were
31886 selected for that reason.

Q. Did you prepare that bid, Mr. Roberts?

A. Yes, I did.

Q. And can you tell us how prices which appear thereon were determined?

A. They were taken from our card index file in the usual manner.

Mr. Werle: Now, if Your Honor please, for the purpose of illustration, I would like to have a few of these cards marked in connection with that exhibit, which is the Commission's exhibit, not for all of the destinations mentioned but merely for typically selected groups of them to show that those prices were taken from these cards.

Trial Examiner Norwood: I do not think that we will waste any time marking those.

Mr. Werle: Well, can we give them a number, Judge—

Trial Examiner Norwood: I do not see any necessity for it.

Mr. Werle: I could do that during the recess without taking the time now.

Trial Examiner Norwood: You just offer a number of cards there, and I will reject them. You have described them already.

Mr. Werle: All right.

31887 Trial Examiner Norwood: And I reject them, and you can have your exception on that. The cards are similar to the others.

Mr. Werle: All right.

By Mr. Werle:

Q. Now, Mr. Roberts, did you prepare your company's bid to the North Carolina Highway Department for the year 1937? Do you recall that?

A. Why, in so far as the prices are concerned, I assume I did, as I prepared all of our bids covering prices.

Q. And as to Commission's Exhibit 3064, which tabulates the prices bid by your company on the 1937 North Carolina Highway Department, will you state whether or not you followed any different procedure as to that letting than you did on this 1936 letting, or was it the same?

A. I think it was the same.

Q. Have you on any occasion bid any so-called base prices to the State of North Carolina?

A. No.

Trial Examiner Norwood: Just what do you mean by that, bidding base price?

The Witness: We have bid nothing but destination prices to the State of North Carolina.

Trial Examiner Norwood: That is figured on base price plus freight?

31888 The Witness: Yes.

31889 Q. Now, I want to call your attention to Commission's Exhibit 9-A, B, and C, purporting to show prices bid by your company and others in June of 1935 to the State of Virginia, and in connection with that I would like to have this exhibit marked for identification.

The witness identified Resp. Ex. 2283 A to D as a copy of Volunteer's bid to the Department of Highways of Virginia, which is referred to in Com. Ex. 9 A to C. That bid was prepared either by the witness or under his direction. This shows all of Volunteer's terms and all of its prices in connection with that letting. Those check marks along the side of those prices indicate that witness checked these prices for stenographic errors.

31890 (RESP. EX. 2283-A to 2283-D, was offered and
31891 received in evidence.)

By Mr. Werle:

Q. Now, I believe it appears, Mr. Roberts, from Commission's Exhibit 9-A to C, that your company bid high at two destinations, at Alexandria and Rosslyn. Will you check that for me and will you explain, if you know, what the reason was for your prices at that point?

A. The only explanation that I can offer is that our prices were constructed in the usual manner and that we bid such prices.

Q. Can you tell me whether or not your company actively solicits business in Alexandria and Rosslyn?

A. We did at one time.

Q. Were you at the time of that bid, in 1936, I believe it is?

A. I do not believe we were actively soliciting business at that time in those towns.

Mr. Werle: Now, again, Your Honor, I assume that I will not be permitted to mark price cards for this bid.

Trial Examiner Norwood: Are they any different from these other cards that we have put in for the purposes of illustration?

Mr. Werle: No, except that they are different destinations and different prices.

31892 Trial Examiner Norwood: There is no use to mark them.

By Mr. Werle:

Q. And to save time, also, I refer to Commission's Exhibit 10-A to D, which purports to be an abstract of bids received by the State of Virginia in June, 1937, Mr. Roberts. Do you recall whether or not you prepared your prices on that letting?

31893 A. I did.

Q. Can you tell me whether or not you prepared that in the same manner as you have described in

31894 regards to the others, so far?

A. Yes.

Q. I want to call your attention now, Mr. Roberts, to Commission's Exhibit 180-A to K, which is an abstract of bids received by the War Department, U. S. Engineers, in August, 1937, and in that connection I show you Respondents' Exhibit 2284-B to F first, and ask you to state what that is.

A. This is a copy of our bid, and letter of transmittal covering this invitation.

Q. And is that your file copy of the bid?

A. That is our file copy.

Q. Now, I show you Respondents' Exhibit 2284-A, for identification, and ask you to state what that is?

A. This is land-grant rates secured from the L. & N.

Railroad, and my computations covering this bid, destination cost price, which was quoted in this bid.

Q. And who obtained the information that ap-
31895 pears on that exhibit?

A. I did.

Q. And what was the source of the information?

A. The notations "from Carson," who is chief clerk to the division freight agent of the L. & N. Railroad at Knoxville.

Q. Was this computation used in the preparation of this bid?

A. It was.

31897 (RESP. EX. 2284-A to 2284-D, was offered and received in evidence.)

31899 Q. Mr. Roberts, you refer to Commission's Exhibit 157, which purports to be a corrected abstract of bids to the United States War Department in September, 1937 (indicating). Then look at Respondents' Exhibit 2285-A to Q, and tell me whether or not this is a complete file copy of your bid on that letting (showing document to witness)?

A. Yes, this is the original file copy, taken from our files on this.

Q. Mr. Roberts, will you look at Respondents' Exhibit 2286-A, B, and C, and state what that is, and state also whether or not it has any relation to your bid which is Respondents' Exhibit 2285-A to Q (showing document to witness)?

A. This is a—these sheets contain land-grant rates secured from the Southern, L. & N., and the Illinois Central Railroad, on which our bid is based. That is the lowest of the rates secured.

(RESP. EX. 2285-A to Q was offered and received in evidence.)

Q. And who secured the information on Respondents' Exhibit 2286-A to C?

A. I did.

Q. From whom did you secure it? From the railroad?

31900 A. It shows the railroads and the names mentioned.

Q. It also shows the individuals?

A. Yes, sir.

(RESP. EX. 2286-A, 2286-B, and 2286-C, was
31901 offered and received in evidence.)

The witness identified Resp. Ex. 2287 A as Vol-

unteer's original copy taken from its files of the bid it submitted on a letting of the Department of Agriculture in April, 1936. He prepared the prices which were submitted on that letting.

Q. Can you tell us, as illustrative, for example as the first destination, Greenville, how that price was determined?

A. The delivered price, Greenville, S. C., that is, f.o.b. Greenville, was taken from our card.

This is in cents per bags; it is a little different in the cents per bags, which requires a division of a barrel
31902 by four to get your per-bag price, of course.

Q. How about the destination cost?

A. The destination cost price was based on land-grant information secured from the sources we have mentioned.

Q. Is that true as to each of the destinations mentioned there, the same explanation as to the others, Dadeville and Statesville, I believe?

A. At Statesville we bid the same price f.o.b. Statesville, and the same destination cost price.

Q. What is the explanation for that?

A. Evidently the land-grant rates we secured did not have the effect of making any reduction in the destination price.

Q. As for this control clause which appears on that bid, —how long have you been using that clause, Mr. Roberts?

A. Oh, for a number of years, I don't know, I can't establish the exact date, and the number of years.

Q. Have you used such a clause as that without interruption?

A. No, we have discontinued its use at times.

Q. Will you tell us what has caused that?

A. Well, if we bid an f.o.b. mill price we wouldn't use it.

Q. Have you bid f.o.b. mill prices?

A. Yes.

31904 (RESP. EX. 2287-A and 2287-B, was offered and received in evidence.)

By Mr. Werle:

Q. Mr. Roberts, I would like to refer you to Commission's Exhibits 1091, 1096, 1085, 1088, 1087, 1090, 1084, and 1094, all of which are bids of your company to the Soil Conservation Service of the Department of Agriculture at various dates during the year 1937.

31905 Now, can you tell me whether or not you used any different method, whether you quoted the prices in the same manner as you have already described in these exhibits which we have already talked about?

A. Use exactly the same methods.

Q. And was your information as to land-grant rates where involved, was that obtained from the same sources which you have already mentioned?

A. It was.

Q. And where a delivered price was quoted, is it correct or is it not correct that you quoted the price appearing on the price cards in your file?

A. That is right.

Q. Now, as to Commission's Exhibit 789, that is another United States Engineers bid. Let's see if I can find the date.

Can you help me on that, Mr. Roberts, from this Government abstract?

A. There is no date shown here.

Q. Well, can you tell me whether or not you recall any such bid as this for your company where it bid the figures shown here?

A. I just have to rely on this abstract. I assume that we did bid it.

Q. Well, can you tell me whether or not you
31906 followed any different method on this bid as to any of the others?

A. No.

31908 Q. Mr. Roberts, let me direct your attention to another subject.

What has been the policy of your company with respect to who pays the freight?

A. Except to a prepay station, we have not paid the freight until just here recently, the last three or four weeks, when we began prepaying all shipments.

Q. Are you aware of the circumstances under which that change in your policy came about?

A. Yes.

Mr. Paulson: Off the record.

(There was a discussion off the record.)

Trial Examiner Norwood: On the record.

Go ahead.

By Mr. Werle:

Q. Will you explain that to us?

A. We received a telephone call from a customer at

Atlanta, Ga., who gave us an order at the same time and requested the same be prepaid. We told him that we were not in the habit of doing so and that we could not prepay this shipment. He said that other companies were
31909 prepaying the freight, and read us a letter from a company to that effect.

Q. Did you change your policy at that time?

A. Not at that time we did not. We told him that we would not prepay that particular shipment, but we later called him back and told him that we would do so, and our policy has been changed to that extent, that we do prepay all shipments now.

Q. Now, this morning, Mr. Roberts, when we were discussing these Virginia tariffs and the use that you have made of them, or would have to make of them, if you did not have the Institute rate books, I understood you to say in response to one of the Examiner's questions that for shipping purposes in your company you would only need, I think you said, one or two tariffs; is that correct?

31910 The Witness: It might require only one tariff at a time, but it would possibly take as many as a dozen to cover the entire territory in which we ship.

31911 Trial Examiner Norwood: You may cross-examine him.

In that regard, one rate book would cover all rates to all parts of the country from your mill, would it not?

The Witness: No, no.

Trial Examiner Norwood: To all points of the country where you ship?

The Witness: No. You might have four differ-
31912 ent tariffs referring to your one basic tariff.

Cross-Examination by Mr. Paulson.

Q. Do you have any share in the formation of policies for your company, Mr. Roberts?

A. I do not.

Q. Are you regarded as a pricing expert in your company?

A. I would not say I would be regarded as a pricing expert. I am asked—I control our prices; that is, the actual work, the physical work.

Q. You are relied on for the price information that your company needs in the conduct of its business?

A. Yes, sir.

Q. Do you check the freight bills that are presented to you by your customers for overcharges? I am speaking, of course, of the period prior to the prepaid policy?

A. No, I do not check the bills.

Q. Does your company check the bill?

A. I don't think so. If it agrees with the amount of freight which we have allowed, I don't think there is any check made.

Q. What do you mean if they agree with the amount of bill allowed?

A. If the freight bill agrees with the amount given by the customer, there is no further check made.

Q. Well, your customer, when he gets a shipment
31913 of cement, pays the freight bill tendered him by the railroad agent, transmits the receipted bill as partial payment of the invoiced amount?

A. Yes.

Q. Now, when you get that freight bill receipted, that receipted freight bill, what do you do with it?

Mr. Werle: Well, I would like to object to that question,—in that it is counsel's testimony as to what this witness does. I think he first ought to ask the witness what is the situation, instead of telling him what his, Counsel's, view of the situation is, and then tack a question on it.

Trial Examiner Norwood: I think he said he received receipted freight bills in part payment of the invoice.

Mr. Paulson: I think—

Mr. Werle: I haven't heard the witness testify a word about that.

Trial Examiner Norwood: Did you say that?—

Mr. Paulson: He did say that.

Trial Examiner Norwood: Did you say that, Mr. Roberts?

The Witness: That is a bookkeeping matter.

By Mr. Paulson:

Q. Answer the Judge's question

Trial Examiner Norwood: Is that a fact?

31914 Mr. Paulson: I am afraid the witness does not understand the question entirely.

Will you put it again, Your Honor, or shall I ask it?

Trial Examiner Norwood: Do you receive the receipted freight bill as part payment for the amount that

is stated on the invoice to the customer? Does your company do that?

The Witness: Yes, I think that is substantially correct.

Trial Examiner Norwood: I think he said that.

By Mr. Paulson:

Q. Well, it is altogether correct, is it not?

A. So far as I know, yes.

Q. Yes.

Now, when you receive that receipted freight bill, what do you do with it?

A. It doesn't come to me, it comes to our bookkeeper. If there is no variance between that freight bill and the amount we have allowed on our invoice, it is merely filed.

Q. Well, the first thing that is done is to check it against the invoice to see whether or not there is a variation; is that right?

A. Yes.

Q. And if there is a variance, then what do you do?

1915 A. If there is a variance, we will allow it, in any case. We would make due allowance for it, and recover from the railroad company, if it was in error.

Q. In other words, you accept the receiptd freight bill whether the freight bill is wrong or right, in your opinion?

A. Yes.

Q. But what do you do with regard to collecting the differences or paying the differences to the railroad?

A. Well, the differences would be paid by the customer, as a rule, unless he should send it in to us and ask us to look into the matter, or demand us to pay it.

Q. In other words, you accept the receipted freight bill do you attempt to collect it from the railroad company? Do you?

A. Yes.

Q. And you check each of your freight bills against the railroad tariffs to ascertain whether or not the freight bill has been made out correctly?

A. Yes.

Q. You check each and every freight bill that you get from your customers with the railroad tariffs?

A. Not each and every one, no.

Q. Well—

A. Only where they are at variance.

Q. Only where they vary from the invoice amount?

A. Yes, sir.

31916 Q. How frequently do you have variations? For instance, in a hundred shipments, how many times would you find that the freight bill amount varied from that which you had placed on your invoice?

A. In very few.

Q. Well, what do you consider to be very few?

A. Oh, I would say one out of three or four hundred shipments.

Q. That goes for overcharges and undercharges,—that goes for variations?

A. That goes for undercharges, only.

Q. How about overcharges?

A. We wouldn't hear anything about an overcharge. I am speaking of an undercharge bill presented by the carrier, you know; that would be the only thing that we would see. If a customer paid less freight than we allowed him, the chances are he wouldn't say anything about it.

Q. Well, the railroad would, wouldn't they—or would they?

A. Oh, yes, if they found it out, they would correct it to the proper amount, yes.

Q. Now, when you bill a shipment to your customer, do you make out a bill-of-lading?

A. A bill-of-lading is made out, yes.

Q. Do you make it out?

A. No.

31917 Q. Does one of your assistants make it out?

A. No, it is done in our shipping department.

Q. Do you supervise the work?

A. I transmit the information to our shipping department which goes on the bill-of-lading.

Q. Where do you get the information which you put on the bill-of-lading—the freight information?

A. The freight information?

Q. Yes.

A. As a rule I use The Cement Institute books.

Q. When you do not follow the rule, then what do you do?

A. I would use the official tariff if I didn't use the Institute book.

Q. What occasions do you have for using the official tariff?

A. Not any now, I believe, unless we should—

Q. What do you mean by "now"?

A. Well, at one time we had no rates, in the Virginia book, for instance, from our shipping point. We were compelled to use railroad tariffs in that case.

Q. Let me see if I get this straight: Do you have any occasion to check the official tariffs now when you are making out bills-of-lading?

A. Yes.

Q. What occasions?

A. In making out bills-of-lading, did you say?

31918 Q. Yes.

A. I don't believe we have occasion to use them, no.

Q. I mean directly or indirectly in making out of the cards on which you keep your freight information, or—

A. Only as a matter of assuring ourselves of the correctness thereof.

Q. Well, of course, I want you to tell me about any use, when I say "any use."

A. Yes.

Q. And you check each and every rate you put on the bill-of-lading against the official tariffs?

A. No.

Q. Have you at one time checked the rate of each and every destination point to which you made shipments, from tariffs?

A. No.

Q. Let me see, now, do you have a card system of filing rates?

A. Yes—not rates, no.

Q. You do not have the freight rates, that you use on your bills-of-lading on a set of cards in your office?

A. We indicate the rate from our files, yes.

Q. To every destination point to which you ship cement?

A. On our price cards, yes.

Q. Now, do you keep any other card besides your price card?

A. No.

31919 Q. You don't have a card specifically for freight rates?

A. No.

Q. Well, now, the freight rate that you carry on that price card, from whence did you take that?

A. It came out of the Institute books.

Q. Did you check it with the official tariffs before you put it on your card?

A. Some I have; some I have not.

Q. How many have you and how many have you not?

A. I can't say; I haven't attempted to check all of our rates, but I—

Q. How does it happen you check some and not the others?

A. Just to assure myself that the rates shown in The Cement Institute's books are correct.

Q. How can you assure yourself by checking one rate that the other rate is correct?

A. I can't assure myself of that fact.

Q. Well, then, you take a chance on one rate, but you check another rate?

A. I have checked them all, in so far as possible—in so far as my work will allow, and time.

Q. Have you ever at any time checked them all?

A. Sir?

Q. Have you, or not, checked every rate that you have used?

A. No.

31920 Q. Have you checked 70 percent of them?

A. I guess so.

Q. Eighty percent of them?

A. Possibly.

Q. Ninety percent of them?

A. Possibly.

Q. Ninety-five percent?

A. I wouldn't go that far.

Q. But you have at least checked 95 percent of the rates in The Cement Institute books in the official tariffs before using them?

A. That's a custom.

Q. And that is a regular practice in your company, isn't it?

A. Yes, sir.

Q. Well, now, when you use the freight rate book, do I understand you simply look at the freight rate book and take the rate out of it and put it on your card?

A. Yes.

Q. What do you do about the supplements to the freight rate book?

A. Supplements? We make such corrections in our books as we receive them.

Q. How do you file your supplements?

A. I beg your pardon?

Q. How do you file your supplements to your

31921 freight rate books?

A. In numerical order as received.

Q. Are your supplements that the Institute publishes the first knowledge you get of a change in rates?

A. Oh, no.

Q. You have already had the information before you get the Institute supplement?

A. I wouldn't say before, but sometimes, yes.

Q. How many times? What percent of the times?

A. All of them—we get all of the supplements to the official publication.

Q. Yes, but what percent of the time—strike that.

How many times has the Institute given you your first knowledge of a change in the freight rate in the last five years?

A. I wouldn't say it has given me my first knowledge at any time.

Q. When you learn of a change in freight rate through your own study of the tariffs, do you change the price on your price card?

A. When we learn—to the official tariff?

Q. Yes.

A. If it was just an individual instance, we would.

Q. Well, if it covered a territory like an emergency charge does, would you?

31922 A. If it was a general change we would possibly wait until we saw where our competitor would run.

Q. Where do you usually get your first information as regards to what your competitor is doing?

A. The quotations and information which we receive from our field.

Q. In the meantime you sell at the erroneous rate?

A. At the erroneous rate?

Trial Examiner Norwood: Sell at the old rate?

The Witness: Yes, we sell—yes; until we change our price—decide to change our price.

By Mr. Paulson:

Q. Have you ever known of an instance where your competitors used the new rate before an announcement from the Institute was published?

A. I don't know what our competitors do.

Mr. Paulson: Well, read that question to the witness, please.

Trial Examiner Norwood: Read it.

(Question read.)

Trial Examiner Norwood: Answer it.

A. I know of no such instance, no.

By Mr. Paulson:

Q. That is, it has been your experience that before your competition uses a new rate, after there has been a
31923 change in rate, there has been issued an announcement from The Cement Institute?

A. I don't know what action our competition takes.

By Mr. Paulson:

Q. Oh, I thought you said on direct that you checked your prices in the field to ascertain what your competition was doing.

A. We do.

Q. Well, in the course of that checking you learn when your competitors change their prices, do you not?

A. Yes.

Q. Now, I am asking you, have you ever found that your competitors changed a price which reflected a change in a freight rate before an announcement of The Cement Institute regarding the change was in your hands?

A. Well, we don't try to tie up with some date which the Institute has made of some announcement which they have made.

Q. I am asking you if a change in destination prices due to a freight rate modification is not always tied up with an announcement by The Cement Institute of the freight rate change?

A. I don't construe it that way.

31924 Q. Well, do you know anything to the contrary?

A. No, I know nothing to the contrary; I can't say—

Q. You have never crystallized your thinking on it; is that right?

A. That's right; that's correct.

Q. Can you now, while you are on the stand there, recall any instance to the contrary of my statement?

A. I can't recall any instance, no.

Q. Doesn't your memory serve you to the effect that the price changes you have found in the field resulting from changes in freight rates succeeded an announcement from the Institute regarding the change?

A. No doubt they would.

Q. Isn't it understood by you that you should not use a new rate, a new freight rate, for making prices until The Cement Institute has issued the announcement about it?

A. We have no such understanding.

Q. Not with your competitors, but don't you have that understanding—

A. No.

Q. —Mr. Roberts?

A. No.

Q. Well, as a matter of fact, however, so far as you know, that is the case, is it not?

A. Not with our company; we use whatever rates we find.

31925 Q. Yes, but I say, so far as you know, the changes by competitors due to freight rate changes do not occur until after announcement by the Institute,—so far as you know?

A. The advance information is given to the public if a change in freight rate occurs; naturally, The Cement Institute has it.

Q. Well, that does not quite answer the question.

To your knowledge, does your competition change its prices when there is a freight rate modification prior to an announcement from The Cement Institute?

A. They do not always change their prices.

Q. That still does not answer the question, but I think we have been over that, Your Honor, and I will leave it.

Well, when you learn of a change through your research into the tariffs, do you report it to the Institute?

A. Yes, I call their attention to the apparent error.

Q. But you wait to make changes in your destination prices until your competition changes the price?

A. No.

Q. Well, now, what do you do?

A. If we had a dealer in that town we probably would; but if we did not we would make the change regardless.

Q. Oh, I see, when you have a dealer, why, you do make the change—don't make the change—and when you are soliciting in some new territory, why, you do make the change; is that it?

31926 A. Well, we attempt to find the prices at which cement is selling in that particular town, before we make any change.

Q. I see. Well, we have been over that, too. I won't repeat.

Now, do I understand that you consider the freight rate Institute freight service—The Cement Institute freight rate service—is adequate to meet your freight rate needs, freight rate information needs for shipping purposes?

A. I do.

Q. You consider it adequate?

A. I do.

Q. There has been testimony in this case—I believe Mr. Werle called it to your attention, too—that routing information was necessary in order to properly make out a bill of lading.

What is your experience along that line?

A. That is not necessary as long as you have the rate inserted in your bill-of-lading; nothing else is necessary.

Q. You think you are adequately protected if you put the rate there?

A. You are.

Q. And you think in no instance the railroad is apt to charge you more than that rate?

A. It can't.

Q. Are you sure of that?

31927 A. Yes, sir.

Q. Have you studied the tariffs about that?

A. I did not study the tariff. Counsel can cite you to the law in that respect.

Q. Supposing that you were making a shipment where two railroads serve the same point and you tender it to the wrong originating carrier. Would you be protected in the rate that you put on your bill-of-lading?

A. Yes.

Q. Have you studied that from the tariff, too?

A. Yes.

Q. And you have to exercise no precaution in choosing the originating carrier?

A. I do not think so.

Q. You do not know, however?

A. If he cannot handle it he will turn it over to the carrier who can handle it.

Q. Are you speaking from guess or experience?

A. I am speaking—well, it is a matter of guesswork, if you want to call it that.

Q. You do not know what the law is on that, or you do not know what the rule is on that?

A. I know very little of traffic law.

Q. Well, isn't it your practice when you are making out bills-of-lading to specify the routing?

31928 A. Yes, we do.

Q. You do it in every instance, do you not?

A. No.

Q. You do it in every instance where there is a possibility that the shipment might go over alternative routes?

A. No.

Q. Well, when do you do it?

A. Only when we consider it desirable from a standpoint of service.

Q. Well, what are your guide posts for desirability?

A. Well, we try to select the routes that will get the shipment there in the quickest possible time.

Q. When is it advisable to select routing?

A. When is it advisable?

Q. Yes.

A. It is not advisable at any time except from a standpoint of service.

Q. But from the standpoint of service it is advisable at all times, is it not?

A. If you want to put it that way.

Q. Well, I don't know a thing about it. I am asking you. Isn't it?

A. From the standpoint of service, I would say yes.

Q. And isn't it your practice to give your customers the best service possible?

31929. A. Oh, yes.

Q. And to give them the best service you make a practice of putting the routing information on your bills-of-lading?

A. Yes.

Q. Do you do that in all instances?

A. No, not in all.

Q. Ninety percent of the instances?

A. A great number.

Q. Ninety percent of the instances?

A. I cannot just average a percent.

Q. Well, about that many? A great many does not mean anything to me.

A. Well, we will call it that, approximately.

Q. In the greater proportion?

A. Yes.

Q. And to get that routing information you must consult the official tariffs?

A. No.

Q. Where do you get it?

A. You get it from a map.

Q. You do not get it from The Cement Institute freight rate books?

A. No.

Q. Is there anything else that you cannot get from The Cement Institute freight rate book that you need in
31930 billing a shipment?

A. Nothing that I know of.

Q. Don't you ever have to take into consideration the size of the car?

A. No.

Q. That does not affect you in your territory?

A. It does not affect us.

Q. How long have you been checking official rates and tariffs for rates in connection with your duties as an employee of the Volunteer Company?

A. Since we started in business—since I have been with them.

Q. Well, your price cards, then, are a work of your own production to a large extent, are they not?

A. Yes.

Q. And how much effort per day, let's say, would it take you to keep those price cards up to date if you were obliged to consult the official tariffs for all information?

A. If you had a new tariff you would have to recheck your whole structure.

Q. I know, but I am asking you. Well, with the exception of a change in freight rates, and—I will strike that, please.

How frequently have freight rates in your shipping territory changed in the last 10 years?

A. How frequently?

31931 Q. Yes.

A. There have been three major changes and the emergency charges.

Q. In 10 years?

A. Yes.

Q. And you ship to most of those destinations in your shipping territory more than once in those 10 years, have you not?

A. Oh, yes.

Q. Having made one shipment and having received the freight bill from your customer and having checked it, you had in your possession the freight rate information necessary to make the next shipment to that destination?

A. Not necessarily.

Q. Except for the fact that there might have been a change?

A. That is right.

Q. And you also learned of changes by consulting the tariffs, have you not?

A. Yes, sir.

Q. Well, now, in view of all of that, I would like to know whether the freight rate Institute—The Cement Institute freight rate service gives you any other aid than that of being a guide to what your competitors are using?

A. We do not care what our competitors are using. It is a guide to us in simplified form, which we can use 31932 for any purpose which we might decide.

Q. Well, it is a ready reference for quotation purposes, is it not?

A. Yes.

Q. That is its principal use, is it not?

A. And for billing, too.

Q. But its principal and major function in your offices is as an aid to quoting, is it not?

A. I would not say that was its principal.

Q. Well, would you say that it is used for that purpose?

A. Yes, sir; it is used for that purpose.

Q. And you use it to check back from the quotations you pick up regarding your competitors' quotations to find prevailing base points, do you not?

A. Yes.

Q. And you use that rather than the official tariffs to check back, do you not? By that, I mean The Cement Institute freight rate books?

A. We do not make free use of The Cement Institute books altogether. We might use the tariff, too, and verify that.

Q. When do you use the tariffs and when do you use The Cement Institute books in checking back?

A. There is no set period; we use them both.

Q. Have you ever found that any of your competitors use a rate not appearing in The Cement Institute
31933 freight rate books, or supplements thereto?

A. Yes.

Q. How many times have you found that?

A. I think there have been numerous instances.

Q. By "numerous," what do you mean?

A. I cannot make any estimate as to the number.

Q. Do you have any way of accounting for those occurrences?

A. I do not remember what the previous question—I do not know what this line of questioning—

Q. The occurrences of which I speak are those numerous instances you refer to wherein your competition had not used a freight rate in calculating destination
31934 price that appeared in the Institute freight rate book, or a supplement thereto.

A. Well, I do not know about that. Some prices which we have found have no relation to freight rates.

Q. Oh, they are distinctly arbitrary?

A. Yes.

Q. But with the exception of the arbitraries, have you ever found a price at a destination point which was not built up on a base plus the Institute freight rate book?

A. No, I don't think that I have.

Q. In your 10 years' experience?

A. I do not think so.

31935 Q. You were without The Cement Institute freight rate books for a while, were you not, Mr. Roberts, in the conduct of your business?

A. Yes, sir; I was.

Q. What period was that?

A. 1932 and 1933, I believe, was the period.

Q. Did you sell at delivered prices then?

A. We did.

Q. Have you added any personnel to your billing or shipping department since—I should change that and say, Have you eliminated anybody from your shipping or billing department since you subscribed to the freight rate service?

A. No, we have eliminated no one.

Q. I am at a loss to understand now just wherein the

freight rate services serves any actual need in your company. Will you explain to me?

A. The freight rate service?

Q. Yes.

A. Well, we have to have some information for our salesmen.

Q. Yes.

A. To enable them to quote such prices if they are called upon to do so.

Q. It serves no actual need so far as shipping purposes are concerned, does it?

A. It serves as much purpose as any other com-
31936 pilation of the same character.

Q. Well, does it serve any actual needs, so far as shipping purposes are concerned?

A. If we did not have it I would have to fix up something myself.

Q. As I understood it from your answers to my questions, you had fixed up and do fix up something by yourself in nearly all cases, anyway.

A. Yes, but you have to have something that you can refer to instantly.

Q. Oh, I see. This is an instant reminder of what the freight rates are. Well, that is not an actual need, is it?

A. More or less.

Q. Well, you got along without it for two years.

A. We got along without it but we had a hard time.

Q. You had a hard time meeting competitors' prices?

A. No, difficult to work up the information.

Q. Well, did you have a hard time making out your bills-of-lading during that time?

A. Oh, a bill-of-lading is a simple matter to make out.

Q. But you had a hard time in finding out and anticipating your competition?

A. We had a hard time in that and we had a hard time figuring particular rates.

Q. How did you have a hard time figuring rates
31937 when you did not have a freight rate book?

A. Because we had to consult so many different tariffs.

Q. I understood you said you consulted those tariffs in most instances now.

A. Only as a matter of verification.

Q. Oh, I see, but if you did not have the freight rate

books now it would be very difficult to make identical bids, would it not?

A. Well, it would not be difficult to make identical bids.

Q. How would you proceed to anticipate the competition of your competitors if you did not have the freight rate books?

A. We do not know what our competitors are going to do.

Q. Do you have any indication of what they are going to do from your experience?

A. No.

Q. You have no indication as to what they are going to do?

A. No.

Q. It says in the answer that you filed that you do have an indication what they are going to do.

A. We do not know what they are going to do in any specific instance.

31939 Q. From your experience, you have learned to know that your competitors quote on base plus freight?

A. Oh, yes.

Q. Now, do you want to change the statement that you made just a moment ago that you have no knowledge as to what your competitors are going to quote?

A. We don't have any knowledge what they are going to quote. We can only act upon the information of what they did at a previous time.

Q. Well, men act on experience, don't they?

A. Yes.

Q. And it is your experience that your competitors follow the practice of quoting base plus freight?

A. Oh, yes, a great many of them do.

Q. Doesn't that give you, that experience that you have had with regard to how your competitors quote, doesn't that give you some reason to believe that tomorrow's quotation, or the next day's quotation, will be base plus freight?

A. It doesn't lead us to believe that it will be any different until we know that it is.

Q. You believe that it will be base plus freight?

A. Yes.

Q. And you make your prices accordingly?

A. Yes.

31941 Q. Isn't it a fact that you have never found an instance, except in the arbitrary zones, where your
31942 competitors have quoted anything else at destination points than some base plus freight taken from the Institute freight rate book, equivalent to the freight rate in the Institute book,—let us put it that way?

A. I am saying that I don't recall anything.

Q. Now, in your business, you follow the practice of quoting prices with a view to meeting the lowest price of any competitor; is that true?

A. That's what we try to do.

Q. Now, what price do you anticipate will be quoted by your competitors at a given destination point? Isn't it the lowest combination of base plus freight?

A. Yes, I think so.

Q. And don't you find that the Institute freight rate book is indispensable if you are going to be able to anticipate those prices exactly?

A. I can't answer that. I don't know what our competition is going to do.

Q. Well, that's what you use the Institute freight book for, isn't it, to anticipate the prices of your competitors at various destination points?

A. No, we use it for constructing our own prices.

Q. But you construct your prices in order to meet your competitors' prices?

A. Yes, in so far as we know, yes.

31943 Q. And you have reason to believe from your experience that your competitors' prices will be the lowest combination of base plus freight?

A. Yes.

Mr. Paulson: Well, I think that is clear.

By Mr. Paulson:

Q. Without the existence of the Institute freight rate books, and the existence of the practice on the part of you and your competitors of using them, you would not expect to find prices by all competitors at a given destination point as uniformly identical as they are with the situation as it is?

Mr. Werle: Just a moment, please.

May we have that question read?

Trial Examiner Norwood: Read it.

(Last question read.)

Mr. Werle: Which one of those questions is the witness supposed to answer?

Mr. Paulson: I submit that—

Trial Examiner Norwood: I think that is a single question.

Mr. Werle: There are two or three assumptions in the question about what other companies do, and what this is, and what has happened here, and then a little question tacked on the end of it.

31944 I think it is an unfair question.

Trial Examiner Norwood: The objection is overruled.

Mr. Werle: I think it ought to be reframed.

Trial Examiner Norwood: Answer the question.

The Witness: I will have to have the question read, Judge.

Trial Examiner Norwood: Read it.

(Last question read by Reporter.)

A. It could be.

By Mr. Paulson:

Q. Would you expect to find them as uniformly identical as they are?

A. We don't expect anything.

Q. Well, when you didn't have them,—the freight rate books—

A. We found very little—the situation very little different.

Q. But you found that there were variations at destinations?

A. No, I have never said that.

Q. Well, did you or did you not?

A. I don't think so.

Q. Were your competitors using the Institute books during those periods, do you know?

A. I don't know.

Q. They were in existence, though, in the years 1932 and 1933, were they not?

31945 A. I think so.

Q. When you didn't have the use of the freight rate books, did you ever underbid your competitors at any destination point?

A. We have underbid our competitors a number of times. I can't recall any exact dates or times.

Q. You don't recall whether you ever underbid your competitors during the period when you didn't have the freight rate Institute books?

A. I don't recall the period; we have underbid them at numerous times.

Q. Deliberately?

A. Deliberately?

Q. Yes.

A. Oh, there wasn't a question of deliberation; it was just a question of our price.

Trial Examiner Norwood: Was it intentionally done?

The Witness: I beg your pardon?

Trial Examiner Norwood: Did you intend to underbid them, or to meet the price, which?

The Witness: We intended to meet the competitive price, the competitive situation, at that place.

By Mr. Paulson:

Q. But you made a mistake in your freight rate and got too low; is that right?

31946 A. We didn't make any mistake in our freight rate.

Q. Wherein did the discrepancy arise?

A. We used—we used a rate which was a logical rate. I don't know the source, whether The Cement Institute or official tariff, but it was a logical rate.

Q. What instance do you have in mind?

A. The bid at Charleston, S. C., is one.

Q. You went in 2 cents lower there?

A. Yes.

Q. And got the business?

A. Yes.

Q. Why don't you follow the practice of going in 2 cents lower?

A. I don't determine the practices and the policies.

Trial Examiner Norwood: Well, in those cases do the competitors use the wrong rate, make a mistake in the rate?

The Witness: I couldn't tell you, Judge.

By Mr. Paulson:

Q. Isn't your answer regarding the 2-cent low bid illustrated in Respondents' Exhibit 2280-A to F, I believe it is?

A. Well, I think it is. If you will tell me that the abstract covering this is different, I will tell you so.

Q. Well, this is the Charleston bid you are talking about, is it not?

31947 A. 2250 is our policy.

Q. Did you have the freight rate books, did you say, when you put in this bid?

A. What is the date of that, please?

Q. (Counsel reading from document.) "Will be opened June 6, 1933."

A. I don't know whether we had the service at that time, or not.

Q. Where did you get the freight rate that you used in making up this bid?

A. I remember the circumstances surrounding that bid. I got that rate from an official publication.

Q. In getting it from the official publication, you bid lower than your competitors—well, delete that, please.

Did your competitors' prices,—that is, the price that they bid,—analyze into the base plus the Institute freight rate book rate?

A. You are asking me if our competitors did that?

Q. I said—

Mr. Paulson: Read the question.

Trial Examiner Norwood: Read the question.

(Last question read by Reporter.)

A. I don't know whether they had the books or not.

By Mr. Paulson:

Q. Did you analyze the bids that your competitors submitted?

31948 A. No.

Q. Did you have any discussion with any of your competitors with regard to that letting?

A. No.

Q. Did you receive any correspondence about it?

A. No, I—.

Q. Did you explain you bid to anyone?

A. No, I don't think so.

Q. Do you know whether anyone in your company explained it to anyone?

A. Not to my knowledge.

Q. Did anyone in your company call upon you and ask you whether or not you got the rate which you submitted for use in making that bid?

A. No.
Q. Mr. Parsons did not ask you about that?
A. Mr. Parsons asked me why I was low, yes.
Q. That was after the bid was—
A. After the bids were read, he asked me.
Q. How long after the bids were read did he ask you why you were low?
A. I don't know.
Q. What was your attitude?
A. Possibly directly after the bids were opened.
Q. What was his attitude when he asked you that?
31949 A. He merely asked me how I arrived at our price.
Q. What else occurred in that conversation?
A. I told him how I arrived at the price.
Q. Did he thereupon leave you, or was there some more conversation?
A. I don't remember any details of the conversation.
Q. Did he say anything to you about watching those rates a little closer in situations like that?
A. I have never been criticized for any work I have done.
Q. Did your company ship the cement on that letting?
A. I think we did,—I am positive we did.
Q. Make any reparations to any of your competitors?
A. No.
Q. When you buy anything, any commodity, f. o. b. destination, do you instruct the shipper as to the routing?
A. When we buy anything?
Q. Yes.
A. I don't have anything to do with the purchases.
Q. I see.
A. Of our company.
Q. Do you check the freight rates, and freight charges, on goods which your company purchases?
A. Years later.
Q. But you do check the charges?
A. Yes, I check them at some time.
31950 Q. Do your customers, to your knowledge, make a practice of checking the rates which you place on the bill-of-lading?
A. I can't answer that.
Q. Do your customers frequently request routing?
A. Oh, yes.

Q. How often, out of a hundred shipments would that occur?

A. Oh—they don't request unless there is some specific reason for it.

Q. Well, can you answer the question?

A. As to percentage?

Q. Yes, about how many times out of a hundred instances would that occur?

A. Oh, I would say possibly ten.

Q. Have you ever entered into any controversy with the freight rate bureau at Bethlehem with regard to a rate which was settled to your dissatisfaction?

A. No.

Q. Does the freight rate Institute book carry any rate to which you have entered a protest or correct suggestion?

A. No.

Q. Have they ever adopted any of your suggestions?

A. Yes.

Q. Are you one of the outstanding traffic authorities for the cement industry in your territory?

A. I—I wouldn't say that, no.

31951 Q. Do you ever have occasion to check with the railroads with regard to rates to sidings?

A. I—I don't get the import of that question.

There is no rate to sidings; rates are made only to towns.

31952 Washington, D. C.,
February 1, 1940.

31954 CLYDE M. ROBERTS thereupon resumed the stand and testified further as follows:

Cross-Examination by Mr. Paulson (Continued).

31960 Q. Have you ever discussed land-grant rates with traffic officials, or any of the other officials of your competitor companies?

A. No.

Q. To your knowledge, have any of the other officials of your company?

A. Did you say have I discussed land-grant rates?

Q. Yes.

A. I don't believe that I have. It may have come up

at one of these meetings in Atlanta, and we may have discussed informally land-grant rates.

Q. What was the purpose of that? Was there more than one meeting at Atlanta?

A. Yes, several.

Q. About when?

31961 A. Oh, they called them at various times.

Q. Who called them?

A. The Southern Freight Association.

Q. What is the function of the Southern Freight Association?

A. The Southern Freight Association is a group of carriers who consider any rate changes contemplated either by the carriers or by shippers; they consider those things before they make official publication, or they reject, or accept; make their decisions.

Q. And your purpose in being there is what?

A. To protest or to plead for rates favorable to our company.

Q. You say the subject of land-grant rates has been discussed at any of those meetings?

A. I can't remember any discussion of land-grant rates. I went to the tariff for my own information. I don't remember any discussion.

31963 Q. Where do you get your land-grant rates today?

A. Today?

Q. Yes.

A. We depend almost entirely upon the carrier, or ask for Government abstracts.

Q. Which carrier do you get yours from?

A. From the Southern Railway, Louisville & Nashville, Illinois Central are the only carriers that I remember asking for land-grant rates.

31964 Q. From what official in those railroad companies—that is, what official—in what official capacity do you obtain those land-grant rates?

A. Most of our contacts are with the Southern and the Louisville & Nashville.

Q. Yes.

A. Mr. Winstead, chief clerk to the assistant freight traffic manager of the Southern Railway, at Knoxville, and Mr. Carson is chief clerk to the Louisville & Nashville Railway at Knoxville,—that is, to the assistant, the division freight agent.

Most of our contacts are with those two parties. I presume they call on their headquarters for such rates. I do not think they are figured in those offices.

The Southern Railway would probably telephone Atlanta as they have telephone communications all over their lines. As to the L. & N., I do not know how they got their information.

Q. Is there any method of distribution or dissemination of those land-grant rates among you and your competitors at the present time?

A. Not with us.

Q. That is, you are not a party to any interchange of land-grant rates at the present time at all?

31965 A. We are not.

Q. Your competitors, to your knowledge, obtain land-grant rates from the same source?

A. I do not know what our competitors do. I have no knowledge of where they obtain their rates.

Q. Are the land-grant rates that you get from the railroad officials, as you said, in decimals of four figures, as high as four figures?

A. Occasionally, yes.

Q. Is it the general rule that the railroad company gives you a figure, a rate figure, carrying more than four decimals, or up to four decimals?

A. They usually carry three or four decimals.

Q. Do you use the third and fourth decimal in your bidding?

A. Not recently.

Q. Since when?

A. For some time back.

Q. About when?

A. You understand, we make the calculation first based on the weight of the barrel of cement before we cut off any fractions.

Q. That is, you make the calculation that you use on your invoice?

A. Oh, no. We do not make any calculation on the invoice.

Q. I do not understand what you mean.

31966 A. To get the land-grant rate which is assessed per hundred weight we have to multiply that by 380 pounds, which is the weight of a barrel of cement. No fractions are cut off up to that time.

Q. Well, why do you do that operation?

A. Beg pardon?

Q. Why do you perform that operation?

A. Why not? How would you find your rate per barrel?

Q. You are in the cement business. I am not. I want to know from you why do you perform that calculation?

A. You would have to perform that calculation. It is published in cents per hundredweight. You would have to make your calculations to determine your pre-barrel rate.

Q. Well, why is it necessary to have the per-barrel rate?

A. Why is it necessary?

Q. Yes.

A. To figure your price.

Q. Why is it necessary to have it to figure your price? I do not follow you there.

A. Why is it necessary? Well, there are certain base prices which we have established. Those are the only ones we are concerned with, is in the Birmingham district, and all those mills, to our knowledge, have used certain base prices.

Q. When you obtain a land-grant rate, we will take a fictional figure of, say, 8.3256, that is per hundred-31967 weight, isn't it?

A. Yes.

Q. And since the Government calls for a bid per barrel, you multiply that times 380?

A. Yes.

Q. And you bid the base plus the product of that multiplication operation there per barrel. Did you follow me there?

A. I think so.

Q. Well, isn't that what you do there, or is it?

A. You take a base figure which we have established and add to it the cents per barrel to arrive at our price.

Q. Yes. But I want to know for sure whether you take the product of your multiplication operation wherein you multiply the exact land-grant rate times 380 pounds, and use that as the freight rate you include in your bid, or whether you drop the fractions and multiply the land-grant figure with fractions dropped by the 380-pound figure, and bid the product of that operation?

A. No, we do not drop any fractions until we get to the price column. We make the multiplication by the exact rate in cents per hundred pounds, then add to that the known base, and the fraction is later dropped.

Q. Which figure do you bid, with the fractions dropped or with them not dropped?

A. We have bid both ways; recently we have
31968 been bidding with the fractions dropped down to two points.

Q. That is, you drop the fractions out of the product of multiplication—you drop the fractions from the product of your arithmetic problem there?

A. We drop the fractions from the resulting total.

Q. Oh, from the resulting total; by that you mean the sum of the freight and base?

A. The sum of the freight and base price.

Q. That is, you drop the fractions from that figure?

A. Yes.

Q. I see. I believe I have that clear, now.

Do you find that you are in as low a figure as your competitors in most of these land-grant rate lettings?

A. No, we haven't been.

Q. Since when haven't you been?

O. Oh, ever since we been in business. We have frequently been out of line with our competitors.

Q. There is a greater degree of discrepancy in the bids where land-grant rates are involved than on commercial business where commercial rates are involved is that so,—a greater degree of discrepancy in the bids between you and your competitors; isn't that so?

A. On the whole, I guess it is.

Q. Would you say that was due to the fact that land-grant rates are hard to ascertain?

31969 A. We have not found them hard to ascertain.

Q. Well, would you say, then, that it is a result of not—strike that, please.

Would you say, then, that those discrepancies result from the fact that you and your competitors do not have a common source from which to obtain those land-grant rates, or do not obtain them from the same source?

A. I cannot account for the discrepancies.

By Mr. Paulson:

Q. Now, I want to leave the land-grant subject for just a minute, Mr. Roberts, and ask you a few other questions.

To how many of the destinations to which you ship cement does The Cement Institute rate book not carry a rate?

A. From what point?

Q. In your sales territory,—any of the destina-
31970 tions in your sales territory?

A. They are fully covered.

Q. It is fully covered?

A. The States are fully covered.

Q. Your answer to the question is that the rate books of the Institute fully covers the situation?

A. I will say I have not found any stations that did not appear in the freight rate books.

Q. No spurs or sidings, water fronts, docks, or anything, any such places to which you ship cement are lacking?

A. Only the two I mentioned yesterday in my testimony, or the day before, and I was wrong about those.

Q. That is, the rate book does carry information
31971 about rates to those spur tracks that you were talking about?

A. Yes.

Q. One of the illustrations Mr. Werle talked to you about, he said that his freight rate books showed a 16-cent rate between your mill and the destination to which you were shipping cement.

I want to find out now what your process is in using that rate. I think we can use a hypothetical illustration there. We do not necessarily have to have the exact figures. What do you do with that 16-cent rate that you see in the Institute book first when you are making up a bid, multiply it by 380?

A. Did you say when I am making up a bid?

Q. Your quotation.

A. You are asking about shipments from our mill, aren't you?

Q. Yes. When you—. Well, when you are making up your invoice or quotation to that destination point.

A. It has no relation to quotations because we have no base price.

Q. Well, when you are making up your bill-of-lading, then?

A. I transmit to our shipping department, that rate.

Q. I want to find out what is done, how it is used. In other words, do you multiply the 16-cent rate by 380,—is that your first operation?

A. No, the first operation is to give the rate to
31972 our shipping department to be inserted in the bill-of-lading.

Q. Let me ask you this: If there is a 16-cent rate in the freight rate book between your mill point and the destination to which you wish to ship cement, how much would the freight on a hundred-barrel shipment be, according to your method of figuring?

You might need some paper. Do you want to figure it out?

A. What is it?

Q. Assume a 16-cent rate, what would be the freight rate, what would be the total rate on a hundred-barrel shipment? What would it be?

A. You cannot ship a hundred barrels.

Q. Well, let's take 50 barrels; ship that.

A. You cannot ship that.

Q. Well, what can you ship?

A. All right. How much do you want? A hundred barrels? That will be easy to figure.

Q. Yes, a hundred pounds.

A. That would be $38.

Q. At a 16-cent rate?

31973 A. Oh, at a 16-cent rate. I get $60.80.

Q. That is what you would put on your invoice?

A. Yes.

Q. Would you expect, then, that the freight bill which you received from your customer would carry $60.80?

A. We would.

Q. Does the railroad accept your weight figures or does it do some weighing, themselves?

A. It accepts our weight.

Q. Does it make any check whatsoever on your weight?

A. On our weight?

Q. Yes.

A. Yes. They have a supervisory service, the Southern Weighing and Inspection Bureau, which operates for southern carriers. It is an independent organization.

Q. Do differences between your figures and the railroad's occur frequently due to weight differences in weight checking?

A. They never occur due to differences in weight.

Q. They do not?

A. Our weights are accepted.

Q. What are they—I thought you said there was some checking by railroads?

A. Did I say that?

Q. I thought you said they had a checking bureau somewhere.

A. Well, you understand that—you should un-
31974 derstand that there is a preliminary test made of a certain number of barrels of cement to determine what the average is.

Q. I see.

A. Then, there is no further weighing. They accept our weights after determining what the average for a barrel is.

Q. How often do they check them,—check your sacks to find out whether you are loading them?

A. No check is made of that.

Q. Well, you said a preliminary check is made, and once determination is had that is all there is to it. This is a subject we have not had up in this case before, Mr. Roberts, and it occurred to me it might be of interest. I would like to have you help me.

31975 A. I don't mind telling you that this preliminary test was made when we first started in business, and I presume it has been made at a number of times. The Southern Weighing and Inspection Bureau should be familiar with the average weight of a barrel of cement. I think they are supposed to police such weights, but I doubt very seriously if any further check has been made since the first check in 1928.

Q. Now, I doubt it.

To how many destinations do you ship cement,
31976 Mr. Roberts?

A. Well, I would say we ship—or have shipped possibly a thousand.

Q. With how many base points are you concerned?

A. Well, that's indeterminable.

Q. Well, how many were you concerned with in 1938 or 1939?

A. I can't give you any exact number.

Q. About how many?

A. Oh, I would say our territory is rather limited; I would say probably fifteen.

Q. Fifteen base points?

A. Yes.

Q. Are you concerned with 15 base points?

A. In the different States in which we sell.

Q. Are you concerned with the Hannibal base?

A. I don't—Hannibal, Mo.?
Q. Yes.
A. No.
Q. Would Wyandotte, Mich., affect you?
A. No.
Q. But you think that there are about fifteen that you are concerned with?
A. Somewhere, possibly ten or fifteen.
Q. Do you know how many changes there have been in those base points in the last three years?
31977 A. I can't estimate.
Q. You don't have experience enough to estimate it?
A. No, I can't estimate it.
Q. Have there been more than five?
A. Yes.
Q. How long would it take you to start from scratch and develop rate information to enable you to properly bill and ship your cement?
Now, you understand, bill and ship your cement, and by starting from scratch, I mean if you had to get your information from the railroad tariffs.
A. I have had occasions when it has taken me an hour or so.
Q. I don't mean any particular shipment. I mean when you get the rates out for all the destinations, sufficient to enable you to carry on your shipping and billing work.
A. Even if you got them out, it would be subject to constant check.
Q. Yes, but I say how long would it take you to get them out starting from scratch.
A. That would depend upon the destination point.
Q. I mean, for all the destinations in your territory to which you ship?
A. What do you want, a calculation of time covering all of the destinations to which we ship?
Q. Yes, how long would it take you?
31978 A. Or do you want an average.
Q. No, I want the sum total.
A. I don't understand the question. We don't ship them all at one time.
Q. Well, but if you should go down to your office tomorrow morning and find the records—all of your freight rate records destroyed, how long would it take you to get

sufficient information to enable you to properly bill and ship your cement?

A. It would take a year.

Q. Take you—one man a year to get that out, would it?

A. It would take a year to assemble your information and place it down in a convenient form.

Q. Then, how much work per month would it require to keep that record current?

A. Well, the only answer I could give you is it would require constant checking, as supplements are received, to freight tariffs, day by day.

31979 Q. As I understand you, in your previous testimony, you said that it was your practice to check the receipted freight bills to ascertain whether or not you had been overcharged by the railroad; is that correct?

A. I said that no check was made unless there was some variance between the amount which we had allowed from our invoice and the receipted freight bill.

Q. Yes.

Now, while you are checking freight bills for overcharges you gain information as to the rates applicable to some destination points, do you not?

A. I beg your pardon?

A. No information that would be of value.

By Mr. Paulson:

Q. Why not? Why wouldn't it be of value?

A. It would only be of value in that particular instance.

Q. Then you could tabulate it, and you would have it for reference for the next shipment which you make, would you not?

A. Yes, you could do that.

Q. Isn't it true that you ascertained the rate information you need for shipping purposes through check-
31980 ing freight bills to catch overcharges?

A. No.

Q. To what extent do you ascertain the rate information that you need for shipping purposes through checking freight bills to catch overcharges?

A. None.

Q. When you said it would take you a year to develop sufficient information to adequately bill and ship your

cement, did you have in mind your own abilities—were you speaking from your experience as to how long it would take you, with your previous experience as a traffic man?

A. Yes.

Q. Do you think it would take you a year to dig out the rates to a thousand destinations?

A. Might take longer.

Q. Well, what I am asking you, would it take you a year to get the rates applicable and necessary for shipping purposes between your mill and a thousand destination points?

A. Yes.

Q. And I mean the thousand to which you ship?

A. It would require a lot of work.

Q. Well, would it take you a year?

Mr. Werle: Your Honor—

A. I estimate it would take a year.

31981 By Mr. Paulson:

Q. I want to find out what you have in mind, Mr. Roberts.

A. I said, to assemble it in convenient form it would take a year.

Q. Well, that did not answer my question. I don't know what you mean by convenient form, so I want to know, to get the rates and jot them down on a tablet, and hand them to me, how long would it take you?

A. (Witness makes no response.)

Q. With your experience, now, take that into consideration.

A. I haven't tried it; I am only giving you an estimate.

31982 Q. How many rates have you checked in any one day, in your experience?

A. I don't know.

Q. About how many? What is the maximum that you have checked?

A. Oh, I have checked a number.

Q. How many?

A. In the course of a day I have—

Q. How many?

A. —I have checked probably fifty.

Q. Now, fifty times—divided into a thousand—is twenty, isn't it?

That would be twenty days it would take you to get those rates out, then; is that right?

A. No.

Q. Why not?

A. Because some rates are more difficult than others to check.

Q. Didn't you have sort of an average day in mind when you checked twenty—

A. No.

Q. —or fifty, rather?

A. No, that was an easy day.

Q. Isn't it comparatively easy to find the rates between your mill and the points to which you ship cement?

31983 A. No.

Q. Aren't you on the Southern Railway?

A. Yes.

Q. And how many tariffs do you have to look to to find the rates to which you ship?

A. To which we ship?

Q. Yes.

A. To which we ship?

Q. Yes.

A. I have approximately thirty cement tariffs in my files.

Q. That doesn't answer my question, how many you have. I said how many do you consult?

A. We consult all of them.

Q. As I understand, then—as I understand your testimony to be that you have to check over thirty different tariffs to find the rates to the destinations to which you ship cement; is that correct? For shipping purposes, now, you understand; we are not discussing for quoting purposes.

A. For shipping purposes, you might need the entire number.

Q. You might, you say?

A. You might need as many as thirty tariffs to cover our whole territory.

Q. What is the consideration that makes you say "might" there? What is the unsettled proposition?

A. Well, there is no definite conclusion; you have
31984 certain tariffs that refer to other tariffs, and although you have a basic tariff you might have half a dozen tariffs that refer to that one.

Q. Yes, but there is one basic tariff that you need to go to first, isn't there?

A. No, there are several basic tariffs.

Q. How many?

A. About three.

Q. Well, you can get the general—you can get most of the rates from those three basic tariffs without going to supplements to them, can you not?

A. No.

Q. You think you would have to go to supplements, and some other additional information than that contained in the basic tariff in many of the instances?

A. Yes.

Q. How many freight rate books of The Cement Institute do you use?

A. Only the ones in the States in which we sell.

Q. Well, how many do you use?

A. We have seven or eight.

Q. Well, how many tariffs would you have to use to ship between Knoxville and Nashville, let us say?

A. You would only need one between Knoxville and Nashville.

Q. And to how many points in the sales territory 31985 in which you ship would you need only one tariff—how many out of those thousands?

A. Oh, about half.

Q. The other half, you think, you would need more?

A. Not half—I will change that—it wouldn't be a third of them covered.

Q. Did you use any of the land-grant rates you received from The Cement Institute?

A. I don't recall.

Q. Did you receive any from The Cement Institute?

A. Yes, we did.

Q. Did you—what was the period covered by the 31986 land-grant service from the Institute to your mill?

A. I don't remember; it was only for a short period.

Q. Discontinued on January 1, 1937?

A. I think it was discontinued before that, so far as we are concerned I don't think that we had it for some time before that.

Q. Well, can you recall whether or not you used it?

A. I have used it, yes.

Q. Did you submit any land-grant rates to the Institute?

A. No.

Q. Did your company, to your knowledge?

A. No.

Q. Do you know why the Institute discontinued the land-grant rate service?

A. No, I do not.

Q. Was it of value to you?

A. Yes, it was of some value.

Q. In what respect?

A. It gave us, in brief form, all of the rates—of the land-grant rates that had been figured from various sources, Government, railroad, and so forth, in convenient form.

Q. Well, was it the actual land-grant rate?

A. Well, the actual land-grant rate, as I understand it, can only be determined between the carriers and the Government.

Q. Well, then, how did this information as to 31987 land-grant rates that had been used, or filed, help you?

A. It helped me, saved me time, at least, from figuring my own computations.

Q. And in making up your bids?

A. Making up our bids, yes.

Q. It enabled you to make identical bids, did it not?

A. I don't know about that. It enabled us to—

Q. It enabled you to anticipate the lowest competition, did it not?

A. It enabled us to use what we thought our competitors would use, and quote.

Q. It gave you something to work with in anticipating the lowest bid by a competitor?

A. Repeat that?

Q. Didn't I put it rather fairly when I put it that way?

A. I guess so.

Q. Mr. Roberts, did the use of the control clause deprive the Government of the full benefit of land-grant rates in any instance of which you are aware?

A. No.

Q. Did you ever calculate the results and analyze the results of bidding, to ascertain that fact?

A. No, I didn't make such an analysis.

Q. In the event that you and your competitors used a land-grant rate in calculating Government destina-
31988 tion costs which was higher than the actual land-grant rate as finally determined between the Government and the railroad, in your opinion did the Government receive the full benefit of land-grant rates?

A. I would not say they received the full benefit, but the variation should be slight.

31989 Q. But do you know of any instance where that occurred? By that, I mean the illustration shown in the question?

A. No.

Q. Did you analyze all of the abstracts on Government lettings where land-grant rates were used?

A. Yes.

Q. With a view to determining that fact or the fact whether or not the Government had been given the full benefit?

A. It is a fact which I cannot determine.

Q. Don't you eventually learn which rate is determined upon between the Government and the railroad?

A. No.

Q. And that is why you cannot determine; isn't that so?

A. That is a settlement between the carriers and the Government.

Q. And that is why you cannot determine whether or not the Government gets the full benefit?

A. Yes.

Q. On the other hand, of course, there are instances where the Government received more than the full benefit of land-grant rates, are there not?

A. Possibly so.

31990 Q. It is your knowledge and belief, is it not, Mr. Roberts, that the land-grant rates which you use in calculating your destination costs to the Government are necessarily arbitrary?

A. No.

Q. Why not?

A. Because I have been told by the carriers that they do not always accept the Government figures.

Q. But in those instances where the railroad's opinion of what the land-grant rate is obtains in the final instance then you have not used an arbitrary?

A. Yes.

Q. But in the other instances where the Govern-
31991 ment's determination after a difference between it and the railroads is finally determined to be the rate, you had used an arbitrary?

A. That may be.

Q. Well, that is the case, is it not?

A. No, that is not the case.

Q. Why not?

A. There may have been—there may have—they may have previously established the rate as being correct.

Q. Yes, but there are many instances where the railroad figures and estimates, rather, the land-grant rate incorrectly, does it not?

A. I do not know what the railroads do, Counsel.

Q. On direct you said you first learned from a Georgia dealer that your competitors were using—were prepaying freight; is that correct?

A. That is right.

Q. And you also said that the dealer asked you to prepay the freight on the shipment which had been consigned to him?

A. Are you referring to me, or the company?

Q. The company, or you, it doesn't make any difference.

A. I did not handle the telephone conversation.

Q. You testified about it on direct.

A. I was sitting next to the party. I heard part of the conversation.

31992 Q. That is satisfactory, then. That is the fact, then, isn't it?

A. Yes, that is the fact.

Q. And your company advised—who was it on the phone, by the way, for your company?

A. It was my assistant, Mr. Wayland.

Q. What is his name?

A. Mr. Wayland.

Q. Mr. Wayland, as I understand it, told the Georgia dealer that you would not prepay the freight on that shipment?

A. He turned around to me and asked what he should do.

Q. What did you say?

A. I said, "We will have to consult with Mr. Parsons."

Q. And you did consult with Mr. Parsons?

A. Yes.

Q. And how long after you received the call did you report back to the Georgia dealer?

A. I do not know what time Mr. Parsons—I think he called him back immediately, or within a few minutes.

Q. Did he make any other phone calls in the meantime?

A. No.

Q. Did Mr. Parsons show any familiarity with the proposition when you introduced it to him?

A. No.

Q. Do you know whether Mr. Parsons had any
31993 previous knowledge about the prepayment of freight?

A. I do not know what knowledge he had, but he was rather surprised.

Q. But he called back immediately and told him to prepay the freight; that is as far as he checked the territory; with that one dealer; isn't that so?

A. I have no knowledge of what Mr. Parsons does.

By Mr. Paulson:

Q. Well, you were there when he called the Georgia dealer, were you not?

A. I was there when the Georgia dealer called us.

Q. And were you there when Mr. Parsons called back?

A. No.

Q. Well, how do you know when he called back?

31994 A. I have a recollection of hearing him call back.

Q. How long after the call came in from the Georgia dealer did Mr. Parsons call back?

A. I think it was within the next few minutes.

Q. He made no further check on your territory than—delete that, please.

You acted entirely on the information from the Georgia dealer in adopting the practice of selling—of prepaying the freight?

A. No, we asked him to send in the letter which he had from another company, stating that they would prepay the freight.

Q. But you told him that you would prepay the freight?

A. In that instance, in that one instance.

Q. And you told him to send in the quotation?

A. Yes.

Q. I see.

Did Mr. Parsons comment about the situation in your presence?

A. No, he did not comment to me.

Q. What comment have you heard from any of the cement men regarding the prepayment of freight?

A. None. I have no such conference.

31995 Q. Now that you prepay the freight, does it change the duties of your traffic department in any way?

A. No.

Q. Do you make any additional checks on freight rates before consigning shipments?

A. No.

Q. No change in your operations whatsoever?

A. No.

Q. No extra expense to you so far as billing and shipping are concerned?

A. Yes, it is an extra expense.

Q. So far as billing and shipping is concerned?

A. No.

Q. Now, your answer to that is that there is or is not any further expense for billing and shipping?

A. I would say none.

Q. The testimony on direct about N.R.A. price filing was not clear to me, Mr. Roberts, and will you explain to me what prices you filed with the N.R.A.?

A. What prices we did file?

31996 Q. Yes.

A. We filed the prices taken from our card index file which we had at that time.

Q. And at that time you were making them up in the same manner you made up those which were produced here; namely, by adding freight to base?

31997 A. If the rates shown on our card were produced in that manner?

By Mr. Paulson:

Q. Well, I am asking you, how was the price which appeared on your card constructed?

A. That is usual, but there might have been an arbitrary price.

Q. But except for the arbitraries the prices on your card were constructed by adding freight to base?

A. Base price, yes.

Q. And you took the freight from the freight rate Institute book?

A. I assume we did, yes.

31998 Q. Mr. Roberts, on page 31910 of the record, line 23, you said this with respect to use of official tariffs for shipping purposes: "It might require only one tariff at a time, but it would possibly take as many as a dozen to cover the entire territory in which we ship."

What did you mean by "one tariff at a time" in that statement?

A. Well, for use at a particular destination; if your destination shows up in that tariff that would only require one tariff, possibly.

Q. But if it does not show up then you might need two or three or four or five?

A. Exactly.

31999 Q. Up to a dozen, you said?

A. To cover the whole territory, yes.

Q. For one destination—I mean, what would be the greatest number of tariffs you have to use for any one destination?

A. Four or five, possibly.

Q. What track did you say you were located on?

A. We are located on the line of the Southern Railway.

Q. Are you on the main line?

A. On the main line from Bristol to Chattanooga.

Q. Do shipments from your plant location to various destinations on that line take the same rate as shipments from the City of Knoxville would?

A. Yes. We are within the switching limits of the City of Knoxville.

Q. Now, if you had a shipment that took the lowest rate by the L. & N. Railroad, and you tendered it to the Southern over which a higher rate applied to a given destination, would you be entitled to the lowest rate?

A. Yes.

Q. You are sure of that, are you?

A. I am positive.

Q. Do you think that the Southern Railroad is bound to give you the lowest rate even though it could deliver that shipment without turning it over to the L. & N.?

A. If my rate was in the bill-of-lading, we would 32000 be protected.

Q. I mean, without specifying the routing information, I mean.

A. Yes.

Q. You say that simply turning it over to a railroad protects you for the lowest rate?

A. That is correct.

Trial Examiner Norwood: That is—

By Mr. Paulson:

Q. How long have you—

Trial Examiner Norwood: That is, no special routing is given, they are bound to select for you the lowest routing?

The Witness: I can explain that in a few words, if you permit me.

By Mr. Paulson:

Q. If you will.

A. The obligation rests upon the carrier not to execute any bill-of-lading containing provisions which it is incapable of fulfilling.

Q. Well, I was trying to specify some conditions here which they could fulfill.

A. If your rate is in there they cannot carry it at that rate unless they so inform you.

Q. Oh, they will inform you, and then you put the 32901 routing information on, or tender it to the other railroad?

A. Yes.

Q. Give them the proper instructions?

A. Give them the necessary instructions.

Q. Yes.

In other words, they would refuse the shipment rather than ship it over the higher rate and attempt to collect it from you?

A. That's right.

Q. Would they, in any instance, eliminate the rate from the bill-of-lading and send the shipment as tendered?

A. They might.

Q. Do they?

A. I don't know whether they make the change, or not, but I have collected claims based on mis-routing, both by myself and by the carrier.

Q. Is it your customary practice to set forth the routing information in a bill-of-lading, or do you rest on your understanding of the law there?

A. We indicate it, if we think it is necessary.

Q. Well, do you think it is necessary as a business practice?

A. No.

Q. In other words, you don't do it?

A. Only from the standpoint of service, as I stated yesterday.

32002 Q. And service demands that you do put the routing information on, I believe you said, in a majority of instances?

A. Quite a few.

Q. Well, in the majority of instances?

A. No, not the majority; the majority of our shipments are unrouted.

Q. What percent of your shipments are unrouted?

A. The greater proportion of them.

Q. Is that because of any peculiar location of your mill?

A. No.

Q. Well, some other witnesses who testified stated that they think it is necessary to route most of the time in order to insure proper service. Do you see any differences between your situation there and some other situations that might exist?

A. I don't know what other situations exist. We are interested in getting the shipment there in the quickest possible manner.

Q. Is it because you are located on the main line there that you don't have to route, in many instances?

A. No, that has nothing to do with it.

Q. Well, what has to do with it? Why don't you have to route in so many instances?

32003 A. The only occasion you might have to route traffic would be when it went off of the line of the immediate carrier.

By Mr. Paulson:

Q. And a majority of your destinations are on your immediate carrier; is that correct?

A. A great number of them are.

Q. Yes.

A. Yes.

Q. All right.

The Institute rate books are not adequate for 32004 checking freight rates for overcharges, are they?

A. They wouldn't be accepted as such.

32006 *Redirect Examination by Mr. Werle.*

Q. Mr. Roberts, Mr. Paulson asked you on cross-examination yesterday about the number of checks that you have made of the rates shown in the Institute rate books, and I believe that you testified that you had possibly checked 90 percent of the rates which you used in the book.

Will you tell us over what period of time you have made this check?

A. Over an 11 or 12-year period that I have been with the company.

32010 Q. Now, yesterday Mr. Paulson asked you, at page 31924 of the record, this question:

"Doesn't your memory serve you to the effect that the price changes you have found in the field resulting from changes in freight rates succeeded an announcement from the Institute regarding the change?"

And your answer was: "No doubt they would."

32011 Would you please explain what you meant by that answer?

32013 A. I meant by that, that these correction notices we receive there when a tariff publication is made, if it is announced in advance, the effective date, as a rule, and we receive our correction notices to the books immediately after such publication—before the effective date.

32014 Q. Mr. Roberts, do you know whether or not your competitors determine their prices on some base plus the Institute rate book rate?

A. I do not know what they use, Mr. Werle. I merely assume the fact that they use The Cement Institute book. They might use the tariff or the Institute book, or some other information.

F. B. WARREN was thereupon called as a witness for the Respondents, and, having been first duly sworn, testified as follows:

32015 *Direct Examination.*

32018 By Mr. Withrow:

I am vice president in charge of sales of Bessemer which is an Ohio corporation. I have held that position since December, 1936 before which that office did not exist. I had a prior position of general manager of sales with Bessemer from August 1, 1936 until I was elected vice president. My predecessor as sales
32019 manager was John Dangle. I had no connection with Bessemer prior to August 1, 1936 and I never had any connection as an officer or employee of the Bessemer Securities Company.

32042 I was never an officer, or director, or an em-
32043 ployee of the Bessemer Cement Corporation, nor of Federal, Peerless, nor of The Bessemer Limestone and Cement Company, a Delaware corporation. I am and have been a director of Bessemer, the Ohio corporation, since the annual meeting in the Spring of 1939. I am not an officer, director or employee of any other cement manufacturing or distributing company than Bessemer.

I determine the sales policy of Bessemer. The Bessemer Securities Company has never dictated the sales policy of Bessemer since I have been connected with it.
32044 W. E. Bliss has never dictated in any way or helped to determine the sales policy of Bessemer. However, he is a member of the board of directors, and as such acts in my election as the responsible officer.

With respect to my experience and background before I became connected with Bessemer: I am a civil engineer. I was engaged in construction work in the early days after college. I was in the Army, and went back to construction work following that experience, and joined the William Bailey Company and was in their Chicago office in 1923. Soon after that I was appointed to hold that office and remained there in that capacity until the summer of 1936 when I came to Bessemer, which was the first cement company I was connected with. The William

Bailey Company was engaged in the business of manufacturing and selling steel windows.

32045 At this time, and since December, 1936, the president of Bessemer is Greoge G. Treet. Prior to that Charles Schmutz was president. He died about the middle of August, 1936. L. A. Beeghly is not an officer or director of Bessemer. There is no responsible officer in charge of sales or anything connected with sales now with Bessemer who was connected with the Bessemer Cement Corporation in 1931 and 1932. W. H. Kilawley, who appears from an exhibit in evidence to have been secretary of the Bessemer Cement Corporation, is not connected with Bessemer, nor is O. E. Wasson. I never heard

32046 the name E. Somers and he is not with Bessemer unless he is in the mill somewhere in some minor position. K. L. Graham is not connected with Bessemer unless as a mill hand. T. Peterson, to whom there is some reference as Traffic Manager of the Bessemer Cement Corporation, has not been connected with Bessemer since I have been with the company.

The main office of Bessemer is at Youngstown, Ohio. Bessemer has one branch office located in Pittsburgh and one mill located at Bessemer, Pa. The freight station is Walford. Bessemer has no other distributing points like silos or warehouses at the present time.

32047 Q. And could you tell us just briefly where you get the raw materials that you use in manufacturing cement?

A. The limestone, the shale, and the clay, sandstone, come from our own properties at or near the site of the plant. The gypsum is imported so is the coal, and occasionally a little silica sand.

Q. And what type of plant is it, wet or dry process?

A. Wet process.

Trial Examiner Norwood: Why are we going into that?

Mr. Withrow: Your Honor, one of the exhibits in this case in the—I think the number is in the three hundreds—there are some exhibits offered on behalf of the Commission, and received, which refer to—which make statements that there are inefficient and poorly located mills from the point of view of production, and we objected to those documents being received in evidence, and we propose to show on behalf of this company that it is well located with reference to sources of raw material, that it is an efficient, up-to-date, economic mill.

Trial Examiner Norwood: Do these documents specify this mill?

Mr. Withrow: These documents, like much of Commission's proof, make a general statement there are mills, without being specific, and the only way we can
32048 meet that is by taking a mill at a time and showing that the particular Respondent is not the mill referred to.

If Counsel for the Commission had chosen to introduce evidence which was specific we would not have had to go into this. We made the objection at the time that it was not specific.

Trial Examiner Norwood: Do you think even if that was a charge that this would be logical, potent to meet that?

Mr. Withrow: Your Honor, it is this testimony that will take this company out of the possibility of being the mill, or companies, referred to by Commission's proof. If we do not do this the argument is going to be made at the end of the case, here is this document that shows that they are inefficient and poorly located and uneconomical and antequated mills, and the Respondents did not meet it because they could not meet it. Now, this Respondent, the Bessemer Company, can meet that proof.

Trial Examiner Norwood: Now, we have gone into that at least a dozen times, and I made a statement here, I think, at the opening of these hearings, that I would receive no further evidence as to the advantages or disadvantageous location of particular mills there. There would be no point in your showing this in the nature of affirming the inconsequent which does not deny the propo-
32049 sition at all.

Mr. Withrow: Well, if Counsel for the Commission are willing to withdraw or stipulate—

Trial Examiner Norwood: No. I am ruling it out.

Mr. Withrow: —that this witness' company is not one of the companies, or one of the mills which is uneconomically located with reference to raw materials and not one of the antequated mills, I won't proceed.

Trial Examiner Norwood: Is there any such charge?

Mr. Withrow: Your Honor, there is evidence that they put in.

Mr. MacIntyre: Your Honor please, this piece of evidence that Mr. Withrow is referring to, as I understand is Commission's Exhibits 340 and 342. It does not pur-

port to show that there are poorly located mills. It purports to show the statement in the form of an admission that was made by Mr. B. F. Affleck, president of the Universal-Atlas Cement Company at the time that he wanted to see prices high enough to protect such poorly located and inefficient mills as were in existence. That is the substance of the thing. Why go around the bush in the manner that we are going around it now.

Trial Examiner Norwood: I think it is irrelevant and I have already stated it, and I hope this won't come up for argument any more,

32050 I am going to exclude it on my own motion; that is, evidence as to the location of these mills from an economical standpoint unless you want to show some relation to the price method, and so forth.

Mr. Withrow: Well, then, in view of Your Honor's ruling I will go on to something else.

Trial Examiner Norwood: Yes.

By Mr. Withrow:

Q. Now, you testified, Mr. Warren, that your mill was located at Bessemer, Pa., or Walford. How close is it to your nearest big market, approximately?

A. About 10 miles from New Castle; 15 miles from Youngstown; 90 miles from—85 miles from Cleveland; around 60 miles from Pittsburgh. I would say Pittsburgh was the nearest big market.

It is my understanding that the capacity of Bessemer's mill is 1,800,000 barrels.

32055 By Mr. Withrow:

Q. Would you tell us, Mr. Warren, whether or not you manufacture and sell special tested cements to the United States Government?

A. We do.

Q. Are there any added costs, Mr. Warren, to you, in connection with the manufacture and storage of these special tested cements for the United States Government?

Mr. MacIntyre: I object. It is irrelevant and immaterial unless the foundation is laid to show that such costs are reflected in the pricing policy.

32056 Mr. Withrow: If Counsel for the Commission today is willing to stipulate, or concede, that there is no issue in this case that the Government is entitled to a better price than commercial customers, and is willing

to agree that any evidence which appears as a part of their case, and in the record on that subject, is not to be considered in the decision of this case, why, I won't go into this matter with this witness, or any other witness. I have no desire to go into these matters per se.

Trial Examiner Norwood: What is your reaction?

Mr. MacIntyre: My contention is the complaint has not made an issue out of whether special prices should be given. It is our contention that such differences in cost that do exist are not reflected in the pricing policies of these companies with respect to one customer or another. We are not concerned with costs, themselves.

Trial Examiner Norwood: Well, if their contention there—

Is there a contention there or isn't there that
32057 these Respondents are at fault for not making a reduction for quantity?

Mr. MacIntyre: There is no charge in the complaint that they should have given quantity discounts,—if that is what your question goes to.

32061 Q. Why don't you operate throughout the entire year?

A. We can't sell enough cement to empty the bins.

Trial Examiner Norwood: Now, just what is this going to?

Mr. Withrow: Your Honor, it all has a bearing on the costs of producing cement, and the reasons for the price level of cement, all of which, I believe, Counsel for the Commission has put in issue by charging that the price is unreasonably high.

32062 Trial Examiner Norwood: I think that you had better go directly into that subject.

Mr. Withrow: Well, Your Honor, if I ask the witness the question if the price of cement was unreasonably high I would call down upon my head such a storm of objection from Counsel for the Commission that the only way I can do it is by in a detail manner bringing out the elements which affect the situation.

If you prefer—

Trial Examiner Norwood: Regardless of Counsel for the Commission, I made the statement that I am going to receive no more evidence about the cost of producing cement, and if the Commission finds that that is relevant and material the Respondent will be permitted to put in complete data about that, and a complete survey; but we

are not going to waste any more time taking piecemeal testimony as to costs, henceforth.

We admitted some with respect to the T. V. A., because that was a special situation where surveys were put in.

Mr. Withrow: In view of Your Honor's ruling, I will take up another subject.

Trial Examiner Norwood: Yes.

Mr. Withrow: I assume that we have an exception to that line?

Trial Examiner Norwood: Yes.

32063 By Mr. Withrow:

Q. What is the market area where you normally sell cement, Mr. Warren?

A. Western Pennsylvania, Western New York State, and Western and Northern West Virginia, most of the State of Ohio.

Q. When you say "Western Pennsylvania," what towns would be about on the fringe, as you go east?

A. Well, we stop solicitation in an area west of Harrisburg.

Q. How far east do you sell in New York State?

A. As far east as Syracuse.

Q. Why did you sell in that territory? Will you state briefly what the reasons are for selecting that territory in which to market cement?

A. Most of that area was an area that had been developed at the time that I joined the company, and we have continued to undertake to hold every market wherever the company was operating at that time, and add some.

Q. Do the costs in any way determine the market area in which you solicit business, or try to,—or do they fix a limit to the territory in which you market?

A. I wouldn't say it fixed an absolute limit; it fixed an approximate area.

Q. When you use costs, what costs do you include?

A. Total cost.

Q. That is manufacturing cost and sales cost

32064 and transportation cost?

A. All of those, and more.

Q. Well, would you tell us, just briefly, how sales costs are involved?

A. If I understand that, we undertake to direct our efforts to that area where we can get a maximum of yield.

for the time and effort and energy expended in the solicitation of cement business.

Now, those things, of course, are the factors that make up sales costs.

By Mr. Withrow:

Q. Do you ever ship beyond this territory which you have described on the record?

32065 A. Yes.

Q. And under what circumstances do you do that?

A. When we have some favorable condition that we can get business without—easily—very easily—without solicitation.

I was trying to define the area where we solicit it actively, where our men call regularly—and if we can pick up a piece of business beyond that easily we take it.

Q. Now, what competitors do you find marketing cement in that area which you have described where you normally solicit business?

A. Universal Atlas, Green Bag, West Penn, Lehigh Medusa, Federal, Huron, Standard, Columbia, Miami, Wabash, Alpha, Green Bag of West Virginia—the first Green Bag was Pennsylvania that I had in mind—Diamond. Then, from time to time, we meet a number of the Lehigh Valley mills.

Q. Do you come in competition with the Capital Company?

A. Some.

Q. I don't know whether you mentioned the Superior Cement Corporation.

A. I failed to mention them, that is another one that we meet regularly.

Q. Now, I believe you said you came in competition with the Federal Portland Cement Company; at what points do you come in competition with them?

A. Well, Western New York and the very west-
32066 ernpoint of Pennsylvania that borders close to New York State.

Q. Would you tell us whether or not you solicit the same trade in that area they do, generally speaking?

A. Generally we do, yes.

Q. Is there any agreement or understanding between you or your company, and the Federal Portland Cement

Company, which divides the business in that territory in any way?

A. None whatever.

Q. Is there any agreement or understanding, or has there been one since you have been connected with the company, dividing the dealers or contractors which would be solicited by you and the Federal Company?

A. No, sir.

Q. Do you ever come in competition with the Peerless Cement Corporation?

A. We solicit in some areas where they also have men. I don't recall specific instances. We sell—we meet them in competition at times; we find them.

Q. Where is that, in your trade territory?

A. The western section of that part of Ohio where we solicit, being to the south of Toledo, from there towards Piqua and Columbus.

32070 Q. Mr. Warren, since you have been with the Bessemer Limestone and Cement Company has there been any agreement or understanding between that company and the Peerless Company dividing the territory in which they solicit business?

A. Absolutely none.

Q. And during that same time has there been any agreement with the Peerless Company not to solicit the same dealers and the same contractors?

A. No.

Q. Is there any large market for cement where
32071 you solicit in which you are the only company which solicits business?

A. No.

Q. And about how many competitors do you find in any given market of any size?

A. Well, anywhere from ten to twenty-five.

Q. Mr. Warren, how far is your mill from the nearest mill of one of your competitors?

A. Approximately 10 miles.

Q. And what mill is that?

A. The Lehigh Company at New Castle.

Q. And what is the next mill, the distance and the company that owns it?

A. I think about twelve—those mileages might be reversed. The Wampum mill of the Medusa Company.

32072 Mr. MacIntyre: As to every company in the industry. We asked every witness that comes on here

where the mills of his competitors are. I refer you
32073 to Commission's Exhibits 3112, 3113. One is a Bureau of Mines map showing the location of every mill in the country. As far as I know since the map was compiled, in 1933, we haven't had the topography of the country shown to have been changed so that the location of those mills would be different.

Mr. Withrow: And it so happens, Your Honor, no one was on the stand to vouch for the accuracy of that map, and that map was very inaccurate as Mr. MacIntyre knows, or, by examination, should know.

Trial Examiner Norwood: It is easy for you to show the inaccuracies, gentlemen.

We have got to make more time. It is not a question of having your day in court, it is a question of having your months in court. We are going to have to shorten it up, and the way to do it is, so that you won't be prejudiced, is to ask your questions and go directly to the issues so the relevancy of these other things may appear. We cannot proceed any more on the idea that eliciting information completes the picture in some way. We have passed that stage.

32074 By Mr. Withrow:

Q. Mr. Warren, would you tell me whether or not in considering any of your pricing and marketing policies you have ever taken into consideration the location of the mills of your competitors?

A. I have.

Q. Would you tell me, then, whether—what the location, the relative location of the mill of the Green Bag Company of Pennsylvania is?

A. Fifty miles to the south of us.

Q. And the location of the mill of the West Penn Company?

A. About 60 miles to the southeast.

Q. And the location of the—

Trial Examiner Norwood: Now, I do not think
32075 you need to go into that unless you have this witness to show what effect those locations have on his pricing method.

Q. Well, Mr. Warren, would you tell me whether or not you considered the relative location of the mills of your competitors in connection with your determining the policy

of whether or not your mill would be a base mill or non-base mill?

A. I have.

Q. Then would you tell me what the relative location of the Diamond mill is?

Trial Examiner Norwood: Wait a minute. Now, tell us how that affected your decision as to basing—as to whether or not you would make your mill a base mill.

The Witness: Your Honor, I have studied that question pretty deeply for the last 3 years. I have read all
32076 this discussion and the criticisms that have been made in an effort to devise some means that I could convince myself would be practical to escape this criticism, and I do not intend this remark to be smart, Your Honor, but if there were not any other mills around anywhere we could make our mill a base mill. It would be no problem, and the fact that they are there then forces us to consider where they are and how they affect us.

Trial Examiner Norwood: Well, explain that to us fully, how the condition affects you.

The Witness: You mean how their location there affects us?

Trial Examiner Norwood: Yes, how their location affects you.

The Witness: Could I do that by example?

Trial Examiner Norwood: Certainly.

The Witness: Well, I would like to make this an extreme case to make sure what I mean. If there were not any of them there we could probably get $5 a barrel for our cement. We could sit there like a store keeper and say "Come and get it." Now, we cannot do that and I would not do it if I could. I do not think it would be good business, but the thing that stops us from adopting that sort of an attitude is the fact that there are competitors located at these various points.

32077 Trial Examiner Norwood: Right in—you might say right in your back yard?

The Witness: Well, they are within the area where I feel we have to sell to keep our mill operating.

Trial Examiner Norwood: Within a 25-mile radius?

The Witness: No. That would be contrary to my testimony.

Mr. Withrow: He has testified that there were two which were 10 and 12 miles.

Trial Examiner Norwood: Well, go ahead and explain the situation as to why you are not a basing mill.

The Witness: That involves so much reasoning it is hard to make it clear, but to make that the shortest way I could put it, would be, I cannot see how we could
32078 gain—I cannot devise any practical way to make ours a basing mill and accomplish the things I feel it is my obligation to accomplish, the things I want to accomplish.

Trial Examiner Norwood: Go ahead.

By Mr. Withrow:

Q. Mr. Warren, would you just tell us whether or not your mill is surrounded—or, I mean name the basing mills close to your mill?

A. I am not just sure about the term "basing mills." There is apparently a basing point at Wampum, one at Cleveland, one at Pittsburgh, and one at New Castle. Those are the nearby ones.

Q. And you testified that Wampum and New Castle were about 12 miles away?

A. That is right.

Q. And would you tell us whether or not it is a fact that you are surrounded by other mills in addition to the mills which you said were apparently basing mills or basing points?

A. Yes. The Diamond mill is something like 80 miles to the west of us.

A. And the Federal mill to the north and the Lehigh mill up there, too; Universal, Green Bag, West Penn,
32079 all within a reasonably close area to our plant.

Trial Examiner Norwood: Within a radius of what? What is the distance of the farthest mill you have named there from your mill?

The Witness: The farthest one is at Buffalo, within 180 miles; the others within 100 miles; such as Painesville.

32080 By Mr. Withrow:

Q. Mr. Warren, how many salesmen does your company employ?

A. Fifteen.

Q. And is that the same number as were employed when you came there in the middle of 1936?

A. No.

Q. What changes have there been?

32081 A. We have three more now than we had then.

Q. And why did you add three more salesmen?

A. Well, to increase our sales volume.

Q. And what has been the result of this adding additional salesmen?

A. We have had more volume.

Trial Examiner Norwood: Are you showing competition now?

Mr. Withrow: Yes, Your Honor.

Trial Examiner Norwood: Is there any denial that this company is in competition in every way except price?

Mr. MacIntyre: We agree that they attempt to sell their cement, their brand of cement, and that at the same time other companies are attempting to sell their brands of cement and to these same customers that this company is attempting to sell its cement to.

Mr. Withrow: Your Honor, some time ago I asked Counsel for the Commission, and Mr. Paulson said he would take it up with Mr. Wooden, the question whether or not Counsel for the Commission were making an issue out of the question of dividing business or sharing business among the companies, and he said he personally did not think there was any such issue in the case but he would have to talk to Mr. Wooden and he would report

32081½ back. Now, we have not had a report. This matter of sales solicitation, adding additional salesmen to get tonnage, has a bearing on that problem, and if it is not at issue in this case, and I see Mr. Wooden is in the room now, perhaps we can clear it up and eliminate all the lines of inquiry which have a bearing on that issue.

Mr. Wooden: Your Honor, we put in some evidence showing at the outset of The Cement Institute's organization there was an understanding to limit production by a certain percentage. We have also put in some evidence in the form of writings by Mr. Mallory showing that at least one purpose in his compilation of statistics was in order to prevent misunderstanding on the point of various Respondents as to how much business their competitors were getting and seek an undue proportion of it, and we put in evidence along that line. I do not see that the mere addition of some more salesmen has any tendency to meet such evidence. I do not doubt that other companies also have put on more salesmen, but it does not affect the question

as to—it would go direct to the proposition as to whether this company's proportion of business has changed. I would not have so much objection to that, but this merely putting on more salesmen in an effort to increase business I do not think bears on the subject very much.

Trial Examiner Norwood: Well, does the Com-
32082 mission deny or contend that there is not a certain amount of competition between these companies other than price competition?

Mr. Wooden: Why, we certainly admit that there is an effort to get business by sales competition.

Trial Examiner Norwood: Well, that is the same thing.

Mr. Wooden: Sales effort.

Trial Examiner Norwood: In the light of that admission, I am going to exclude all other testimony as to this salesman proposition. I think it has been shown so many times in the record that they have their salesmen out, and they do contend with one another for business, and the charge is in that process they have agreed or entered into cooperative action in contending at the same price, and that there is no price competition. Now, that is your issue, and we are going to stick to it.

32084 Trial Examiner Norwood: I think the complaint is specific about that one thing. It says price competition.

32085 By Mr. Withrow:

Q. Would you just list, Mr. Warren, the principal markets, principal cities, in which you solicit purchases of Portland cement?

A. Buffalo, Bradford, Pa., Johnstown, and then cut across into Charleston, W. Va., and the included
32086 area; Pittsburgh, Wheeling, Columbus, Youngstown, Cleveland, Erie, Pa., Akron, Massillon, Mansfield, Ohio. That is the general area. I do not mean those as limiting, but I have named the most important big cities.

Q. Now, in this sales area which you have described would you tell us whether or not you attempt to solicit business at all the cities and villages located within that territory?

A. Well, there are parts of the area where we do definitely—where we carry that to the extreme, and other parts where we do not. Generally speaking, as we get further away from home we are less intensive in our solicitation.

Q. Would you tell us whether or not the volume of your sales in these principal cities that you have mentioned would be constant year in and year out, or does it fluctuate?

A. Oh, it fluctuates pretty widely.

Q. So that one year one city might be your principal market and another year another city might?

A. That is true.

Q. From the point of view of sales?

A. That is true, yes. And it is not limited to the cities.

Q. Would you tell me whether or not you would be free to extend the market area where you normally solicit the sale of cement if you decided that was a feasible business proposition?

A. Yes, I would.

Q. Now, since you have been with the Bessemer
32087 Company, are there any markets which you have been driven out of?

A. I do not think—I am sure there is no case of that.

Q. Well, have there been any of these important markets that you listed where the price has been reduced since you have been connected with the Bessemer Company?

A. Yes.

Q. Well, give us an example.

A. Both Buffalo, Cleveland, Erie, quite a good many of them.

Q. What effect does this reduction in price have upon your sales solicitation in Cleveland, for example?

A. I cannot think of any change that it has made.

Q. You still solicit as you did?

A. As we did, yes.

Q. And why did you continue to solicit in that market after the price had been reduced?

A. Do you mean Cleveland?

Q. Yes.

A. It is an area that I believe we need the business that comes from that point. We have to have it to get enough operation for our mill, and our company has had a big investment there over many years in the form of effort to make and maintain contacts with the trade, and are unwilling to give that up, and there is another reason, the opinion that it is a logical area to us.

32088 Q. Do you have, Mr. Warren, any minimum, fixed minimum mill net below which you won't make any sales, or shipments?

A. No.

Q. Would you tell us, approximately, what the range is between your maximum mill net and your minimum mill net? Take any year you want to take, since you have been connected with the Bessemer Company.

A. Last year our maximum mill net—this may not be the top, but around $1.70 would be the highest that I would recall, and we had some business that would be less a dime, would be $1.60, and our minimum mill net would be around $1.07, less a dime, that would be.

Q. When you said "less a dime," that is the—

A. Cash discount.

32089 Q. That is less the cash discount?

A. Yes, cash discount.

Q. And I suppose this $1.70 would be in the territory right around Walford, contiguous with Walford?

A. Yes, just a few points there.

Q. Well, if you know, would you tell us what the approximate consumption is per year in Walford?

A. Oh, might vary from a thousand barrels to two thousand.

Q. Now, would you tell us, if you know, what the weighted average per barrel shipment of cement was,—the mileage?

A. Our mileage?

Q. Yes.

A. Our weighted average?

Q. Yes, approximately, if you know.

32093 A. Approximately 80 miles; as a matter of fact, it is more likely shorter, it would be closer to 70, between 70 and 80.

By Mr. Withrow:

Q. Now, Mr. Warren, when you are making sales in any given town, would you tell us whether or not you quote and sell to all dealers in a particular location at the same price?

A. At the same destination?

Q. Yes.

A. Yes, we do.

Q. Take, for example, the metropolitan area of Cleveland. Would you tell us whether or not in that whole metropolitan area you sell at the same price to all the dealers there, or whether you sell at different prices?

A. The same price to all dealers in the area.

Q. And that would be regardless of whether or not there was a difference in freight rates to those various points in that metropolitan area?

A. Yes.

Q. Now, you testified a little while ago, Mr. Warren, that you determined the sales policies of your com-
32094 pany. Would you tell us whether that included the determining of the pricing policy of the Bessemer Company?

A. Yes, that includes that.

Q. Mr. Warren, would you tell us whether or not in your experience you have been able generally to sell cement at a higher price than your competitors quoted—openly quoted price?

A. We have not.

Q. Would you tell us whether or not, in your experience, the question of the amount of service in the form of quick delivery or otherwise plays any part in the solicitation and sales of cement to your dealer customers?

Trial Examiner Norwood: Now, I take that in the sense of it having an effect on sales; is that right?

The Witness: Well, I interpret it as a question to
32095 mean what affect it has on us, on how we solicit, and where.

Trial Examiner Norwood: The service that you give these customers has an effect on your sales, doesn't it?

The Witness: Yes, indeed.

By Mr. Withrow:

Q. Mr. Warren, would you tell us whether or not you attempt to meet the services rendered by your competitors to dealers' trade, dealer and contractor trade?

A. To the best of our ability.

Q. Now, with reference to such services, quicker delivery, would you tell us whether or not you have found that any of your customers have been willing to pay a penny more because of better service that you rendered than one of your competitors?

A. I haven't found any such case.

Q. Now, in the solicitation of business, have you found that dealers express a preference for one brand of cement over other brands of cement?

A. Yes, we have a good many dealers that express a preference.

Q. As a result of this preference, have you found any

that are willing to pay a penny more because of this preference, in the general run of business, I mean?

A. Well, in answer to that, I would say that the instances would be very rare, and, as a matter of fact,
32096 I can just think of one where we have had it.

Q. Well, was he willing to pay a substantial amount more?

A. In that case it was 2 cents.

Q. Was he a big customer, or small customer, do you recall?

A. He was a dealer in a little town down in Pennsylvania back in the hills there, a fine old gentleman that unloaded from a car with a horse and buggy.

Trial Examiner Norwood: You need not go into detail. I think you have answered that.

By Mr. Withrow:

Q. Well, now, would you tell me whether or not you, in selling Bessemer cement, have ever encountered any sales resistance from a buyer on the basis of the quality of the Bessemer cement?

A. You mean objection to our quality?

Q. Yes.

A. No.

Q. Does your Portland cement—is it just equal to the minimum standard specifications of the A. S. T. M.?

A. Well, it is well above that standard.

Q. Have you ever run into any sales resistance to your cement because of its color?

A. I think some talk. I can't put my finger on an instance where we have lost business because of it.

Q. Do you know of any instance where a dealer was willing to pay a penny more for the cement of a
32097 competitor because it liked the color of that cement better than the color of yours, if you know?

A. I know of none.

Q. Would you tell us whether or not, Mr. Warren, in connection with your solicitation of purchasers of cement you have found the dealers to be a well informed group of buyers, individually, or poorly informed, as to the matter of price quoted for cement?

A. They are all very well informed.

Q. Now, would you tell us, Mr. Warren, when you came with the company in 1936 whether or not you continued to

quote and sell cement at the prices which you found
32098 the Bessemer Company had quoted prior to your coming there?

A. I did continue those prices.

Q. Would you tell me whether or not the Bessemer Company has ever taken a lead in establishing new prices?

A. Well, that I don't know. Surely must be instances where we are the first to quote the price to a given customer, and that—

Q. Well, has there ever been an instance where you have changed your announced price at a number of destinations?

A. You mean a general change?

Q. A general change, where you have changed from your previously announced price before any of your competitors made a move toward a change?

A. No, no, we have not.

Q. Would you tell me whether or not you would be free to assume such price leadership, if you wanted to?

A. Oh, I would be free.

Q. Would you tell me whether or not there is any agreement with any of your competitors that you should not assume such price leadership?

A. There is no agreement.

Q. Would you tell me whether or not The Cement Institute has ever attempted to exert any pressure on you not to assume price leadership?

A. None at all.

32099 Q. Now, is there some single company in your territory,—I mean the territory where you market,—which you can point to as the price leader in that territory?

A. No.

Q. From your experience, since you have been in the territory, has it always been one company that led on changes, or not?

A. No.

Q. To your knowledge, is there any agreement to which the Bessemer Company is a party, or any agreement to which it is not a party, that the particular company should be the price leader for the territory where you market cement?

A. I don't know of any agreement.

Q. Are you a party to any such agreement?

A. Oh, no, I am not.

Q. Now, you said that since you have been with the Bessemer Company in 1936 it has not always been one company that led off on price changes.

Could you list a few of the companies that have made and initiated such changes, if you recall them?

A. I can't name them all. Alpha led once that I know of. Huron did once. Medusa. Another instance where Huron did—I am thinking of Huron at Cleveland once, and Huron at Buffalo once.

Q. I guess that is enough.

32100 Would you tell us, Mr. Warren, when these price changes took effect what was the first source of information you had about such a price change? What was the first information you got, and what was its source?

A. Giving the information that came to me personally?

Q. Yes.

A. From our office man, our office manager, in one case. One case was a dealer in Youngstown. One case was a salesman. I would say, generally speaking, when those changes have come they have come from the salesman to our office man to me, from our office manager.

Q. Would you tell us, if you know, where the salesman got that information when they reported it?

A. From his customers.

Q. From a dealer or contractor?

A. That's right.

Q. Now, who determines whether or not you change your announced prices when you find a change in price made by one of your competitors?

A. I do.

Q. Now, have there been any occasions where the price has been lowered since you have been with the company?

A. Yes.

Q. Would you tell us whether or not you have met these lower prices in all instances?

32101 A. Yes, I have.

Q. Would you tell us why you met those lower prices?

A. Because we wanted to stay in the market where the prices were lowered.

Q. Now, in the event of a price change, would you be free not to follow a price increase, if you so desired?

A. I would be free.

Q. Has there been an instance of a price increase in any of your territory since you have been there?

A. Yes.

Q. Did you follow along the increase?

A. Yes.

Q. Would you tell us what your reasons were in that instance?

A. I felt that we needed more money at those points where the price was raised.

Q. Now, in the event of these price changes, would you tell us, approximately, how long it is that the information is in the hands of the dealer-customers before it is brought to the attention of your company,—if you know?

A. One instance we had it, I would say, by 10 o'clock on the morning that it was received in the mail, or before. Another instance—well, two cases—where we had it in early in the morning of the day on which it was received by the customer. I think there have been one or two instances where we have been late in the day, and one or

32102 two cases where it may have been a day or two before we found it.

Q. Well, in those instances of a day or two, if you can recall the specific facts,—I mean, as to what that locality was, and the circumstances,—would you tell us?

A. It was a case—the one I have in mind—at Syracuse, a point which we don't solicit very much, have only one customer there, and he called—I can't get the exact circumstances—but he called and wanted to buy a car of cement, and wanted to know if we would meet the prices that he had, and said that he had had these prices earlier, a day or two before, and wanted us to ship a car that day if we would meet the price.

Q. And did you meet the price in that instance?

A. Yes.

32104 Q. Now, would the Bessemer Company be free to quote and announce prices lower than any of the announced prices of its competitors in the market?

A. You mean would we be free to do that?

Q. Yes.

A. Yes, we would.

Q. Would you tell me whether or not there is any agreement with any of your competitors that you will not reduce the price by issuing any quotations lower than the prices that you find in the market?

A. There is none.

Q. Well, is there any instance where you issue quotations lowering the price below the lowest price which you found quoted in the market?

A. No, we have never done that.

Q. Would you give us the reasons why you haven't done that?

A. There has been no time when I have been willing to take less than our current price at any of these points, unless I was forced into it. I did not want to lower our price.

Q. Mr. Warren, do you have any requests from dealers and contractors for prices below your openly announced price at a given point, destination?

A. Do we have?

32105 Q. Requests.

A. Requests to quote lower prices? Oh, yes.

Q. Would you tell me what—why, in specific instances—in any specific instance you do not quote lower prices than your quoted prices after such a request?

A. Well, there are several reasons involved there.

Q. Will you state them briefly?

A. One is, there has never been a time when I would be willing to take less, when I wanted the price lowered, and one of the basic things that I use as a guide is that each quotation establishes a market, and the movement or sale—I say quotation, I mean sale—each sale establishes a market, and a movement is likely to establish a trend, and I have never been in a position where I wanted to trend the market down, trend the price down. I mean by that that our prices haven't been such as to make me want to do it.

32110

Washington, D. C.,
February 2, 1940.

32112 F. B. WARREN, thereupon resumed the stand and testified further as follows:

Direct Examination (Resumed) by Mr. Withrow.

Q. Mr. Warren, has it been the policy of the Bessemer Company to give any protection to its customers in the event of a price increase?

A. Yes.

Q. Would you just briefly describe the nature of that protection, and what you do and how you do it.

A. In case we move our price up we undertake to give our customers advance notice, usually five days, that we are going to move it up, and during that time we will take orders for shipment at any time within the following two weeks, firm orders.

Q. Is there any protection on specific jobs?

32113 A. Oh, yes.

In case of a contractor's bidding work, we will accept contracts for the amount of cement required, for a specific job, a contract he may have under way, for the length of that job, generally, at the current price; that is, the price in effect at the time the job is being bid.

Q. Now, is it to your commercial advantage to delay the effective date on price increases,—to give this advance notice?

A. Why, I regard it as a matter of business courtesy, it seems to be a necessary thing.

Q. Business courtesy to whom?

A. To our trade, to our customers.

Q. Now, is there any notice given as to price reductions, advance notice?

A. Never made a reduction except we made it effective immediately.

One other class to add to that other question you asked, products makers, concrete products plants, we protect them for a quarter, and we will protect the requirements of the county for a quarter.

Trial Examiner Norwood: For a quarter, you said; three months?

The Witness: For a quarter of a year, Your Honor.

Trial Examiner Norwood: Yes.

32116 The witness identified Resp. Exs. 2288 to 2294, inclusive, as copies of Bessemer invoices, which were prepared under his supervision.

Examination by Trial Examiner Norwood.

They have all the data on them that the originals have and the originals were sent out to the customers with the shipments. All the customers and the destinations are named on the copies.

32125 (RESP. EXS. 2288-A to 2288-Z-74, 2289-A to 2289-Z-74, 2290-A to 2290-Z-74 2291-A to 2291-Z-74, 2292-A to 2292-Z-74, 2293-A to 2293-Z-74, and 2294-A to 2294-Z-9, were offered and received in evidence.)

32126 By Mr. Withrow:

Q. Mr. Warren, do you make any sales on prices f.o.b. your mill?

A. No.

Q. What is your general price policy with reference to sales?

A. We sell at destination prices.

Q. In carload lots, or less than carload lots?

A. In carload lots.

Q. Now, since your connection with the Bessemer Company, have you had any requests for f.o.b. mill quotations from the United States Government?

A. Yes.

Q. Do you recall when the first time was that you received any such request?

A. That's a request for f.o.b. mill?

Q. Yes.

A. Some time in the fall of 1937.

Q. What division of the Government made the request for bids?

A. W. P. A.—the W. P. A., I believe, the Columbus, Ohio office.

Q. What did you do about this request?

A. We did not bid.

Q. Why didn't you bid?

A. Why, I don't believe in f.o.b. mill selling, and I don't believe we can gain. I don't think that's a proper
32127 way to operate our business, to sell f.o.b. mill.

Q. Is there any added reason for not selling to the W. P. A. in 1937 on their inquiry in 1937?

A. That inquiry, as I recall it, covered business that we have a pretty firm belief in selling to the dealers, and not directly. I was unwilling to bid on it because I didn't want to interfere with our normal processes of selling through dealers.

32129 The witness identified Resp. Ex. 2295 A to E as a copy of a Bessemer bid. The invitation there from the U. S. Engineers office, War Department, is typical of the invitations which Bessemer has received since he has been connected with the company. He identified Resp. Ex. 2296 A to C as a copy of an invitation which Bessemer received from the Department of Justice, Bureau of
32130 Prisons. It is typical of the few invitations which Bessemer has received from the Bureau of Prisons. He identified Resp. Ex. 2297 A to D as an invitation which Bessemer received from the Department of Justice, Federal Reformatory. It is typical of the invitations which Bessemer has received from the Federal Reformatory since he has been with the company. It is a copy of the bid which Bessemer made in response to that inquiry. He identified Resp. Ex. 2298 A to D as an invitation which Bessemer received from the Interior Department, National Park Service. It is a copy of Bessemer's bid on that in-
32131 vitation. The inquiry or invitation is typical of those that Bessemer received from the National Park Service. He identified Resp. Ex. 2299 A to D inclusive as an inquiry which Bessemer received from the U. S. Treasury Department, Ohio State Procurement Office. It is
32132 copy of Bessemer's bid on that inquiry. He identified Resp. Ex. 2300 as an invitation which Bessemer received from the Treasury Department, West Virginia State Procurement Office; Resp. Ex. 2301 as an invitation which Bessemer received from the same office; Resp. Ex. 2302 as an invitation which Bessemer received from the Treasury Department, Pennsylvania State Procurement Office; Resp. Ex. 2303 as an invitation which Bessemer received from the State of New York, Department of Public Works, Division of Highways; and Resp. Ex. 2304 as an

invitation which Bessemer received from the State of Ohio. The materials filled in in all these invitations were the bids which Bessemer made in answer to respective inquiries. The inquiries are typical of those which Bessemer received from the various agencies from which these inquiries purport to come.

Mr. Withrow: Your Honor, I offer in evidence at this time Respondents' Exhibits 2295 through 2304, with the exception of 2301, which I won't offer at this time, with the appropriate sub letters (handing documents to Mr. MacIntyre).

32133 Mr. Paulson: Might I ask why these are offered, —what purpose they serve? There is no foundation laid, no connection shown; it is absolutely impossible to understand the purpose of the offer.

Trial Examiner Norwood: Do they relate to bids in evidence now? What is the purpose?

Mr. Withrow: Your Honor, the purpose is to show the manner in which the purchasing agents to which this company sells cement, and from whom they receive inquiries, asked for bids, and the form which those invitations show.

Trial Examiner Norwood: Is it necessary?

Mr. Withrow: The bearing upon this case is that there is some evidence in this proceeding as to a policy being adopted by the Government with reference to asking for bids in a certain form, because it felt that that was the correct way to ask for them, or the best way, or some such thing, and I am showing inquiries both before and after that alleged adoption of policy by the United States Government showing the manner in which they still asked for bids, and its having a bearing upon the way in which they received them.

Trial Examiner Norwood: Do you think it is necessary to accumulate evidence here on this point?

Mr. Withrow: Well, Your Honor, it is—

32134 Trial Examiner Norwood: You have shown numerous times, in numerous exhibits here that the Government did ask for alternate bids; that is, for f. o. b. mill and destination cost bids, and also evidence by the Commission's own witnesses, and exhibits, that in all cases the Government awarded the contract on the destination cost.

Mr. Withrow: But, Your Honor, in this instance they are not requests for bids in the alternative. These are requests by the United States Government, or by State Governments, solely for delivered prices.

Trial Examiner Norwood: Yes.

Mr. Withrow: And that is the basis on which they asked for them, and that has a bearing in here.

I tried to get this point in by oral testimony, and I was met by the objection of Counsel for the Commission that that was not the best way to do it, orally, and I am now proposing to do it in the manner that they forced me to do it.

Trial Examiner Norwood: Aren't there dozens and dozens of exhibits showing that the Government asked for bids just in the way that these exhibits show?

Mr. Paulson: Yes, that is what I say.

Trial Examiner Norwood: Yes.

Mr. Paulson: That is why I wanted to know the particular purpose that they are offered here for.

Voir Dire Examination by Mr. MacIntyre.

32135 In using the word "typical" in describing the bids in response to Mr. Withrow's question, he had in mind that this represented and was similar to many that Bessemer had received from this Lieut. Col. Covell.

32137 By the word "typical" he means representative, simply that they are similar to the other bids that Bessemer made as requested.

Examination by Trial Examiner Norwood.

If calls for the same kind of bids, as a matter of fact, similar in many respects. Bessemer finds that it gets a request from a particular fellow today and handles it; two weeks from today, it gets another request from him that will probably be on the same form but there would be a difference in here in his filled in matter, and then "that one and that" represents what Lieut. Col. Covell asks Bessemer to do.

32138 Q. Do any of these antedate the dates of the invitations from the U. S. Procurement Division during 1938 when they asked for f. o. b. mill bids, and which you failed to bid—the Good Friday and the subsequent bids?

Mr. Withrow: Your Honor, I submit that the documents, themselves, show on the face of them whether they antedated it or not.

Mr. MacIntyre: It is an announcement of policy.

Mr. Withrow: I do not see why we should waste time.

Mr. MacIntyre: It follows up his Honor's question on that.

Trial Examiner Norwood: He might as will give us the information, because I want to settle a point on it here with regard to these particulars—this class of exhibits. 32139

By Mr. MacIntyre:

Q. The Good Friday bid being March 30, 1938, and the others during May, 1938. Do any of them antedate them, or are all of them subsequent to them?

Mr. Withrow: Your Honor, as to that it is not proper voir dire examination, and I object.

Trial Examiner Norwood: The objection is overruled.

A. (Witness examines document.) There is one dated April 7th.

By Mr. MacIntyre:

Q. April 7th, what year?

A. 1939. (Indicating.) Here is one October 4.

Q. What year?

A. 1939. (Indicating.) September 6, 1939.

Q. Well, do any of them antedate March, April, or May, 1938?

A. Here is one August 8, 1939.

Mr. Withrow: Your Honor, I object to this. The exhibits speak for themselves.

Trial Examiner Norwood: The objection is overruled.

A. (Indicating.) Here is March 10, 1939, and here—

Trial Examiner Norwood: I think that in view of the slight relevancy of this whole matter, and in view of the fact that there is an abundance of evidence in to the same effect—that is, so far as the purposes have been explained to me heretofore—that we shall waste no further time on exhibits of this nature which are offered to show the customers asked for destination prices. 32140

I shall sustain the objection.

Mr. MacIntyre: My objection to that, as was brought out on the voir dire examination, was just this: They do not add anything to the record. If they were to be received, they show only a policy. I would not even say that they show a policy. They show that in certain instances after the Federal Government failed to get f. o. b. mill

bids in 1938, that in some instances they did
32141 ask for delivered prices. They had to have cement.

It does not meet any issue in the complaint.

Trial Examiner Norwood: Well, let's save that discussion until later. I think that my statement has covered that situation with regard to these invitations, and further evidence that particular dealers have requested delivered prices—. Go ahead.

Mr. Withrow: Your Honor, I offer to prove through this witness—

Trial Examiner Norwood: Now, wait a minute. Those are marked for identification. They are their own offer of proof. They show what they show, and I do not think that unless you state the purpose—

Mr. Withrow: Your Honor, I was going to make an offer.

Trial Examiner Norwood: You may call my attention to something in there that you have not referred to yet that might render them relevant and material. I do not know about that.

Go ahead.

Mr. Withrow: Your Honor, I was going to offer to prove certain contents of Respondents' Exhibits 2295 through 2304, which, I think, if Your Honor would examine them you would admit since they are material and relevant, but I won't extend my offer in the record.

32142 Trial Examiner Norwood: Go ahead.

That gives you an exception on all invitations. They are offered here to show that the Government, or anybody else, requested delivered prices.

Go ahead.

Please do not offer any more of them to be marked.

32143 By Mr. Withrow:

Q. Mr. Warren, I show you Respondents' Exhibits 2305-A to R, inclusive, and ask you if that is an invitation which you received, together with an interoffice memorandum concerning that request for a bid?

A. It is.

Q. And from whom was that invitation received?

A. The commanding officer of the Quartermaster's Department, Washington, D. C.

Q. And did you bid on that inquiry?

A. We did not.

32146 Trial Examiner Norwood: Can you tell us off-hand? Answer my question, please, sir.

32148 The Witness: Your Honor, this asks us to bid for whatever the Government may require over a period of approximately three months, and to name a price f. o. b. our mill, and my experience in handling these matters—I would like to first get my state of mind before you. It leads me to want to be in a spot, if I am going to bid at all, where I can bid effectively, where I can actually bid to get the business and if I am doing that I want to know what is in the buyer's mind, and what is going to influence his decision to give me the business, or not to give me the business, and I do not like to enter a race in the dark—to enter into a struggle when I do not know who I am going to fight; he may lick me; and when they ask us to bid f. o. b. our mill it is my feeling that they deny us the privilege of actually entering into competition with others that are going to bid, and we know that they are going to have many others bid, and the only way I know to intelligently compete is to know where they are going to use it so that I can have the best gauge I can as to what things will influence his decision for or against me, and I find that a

32149 bid at the point where he is going to use it is the thing that gets me closest to a particular basis of competition; one where I can do my job most effectively.

Trial Examiner Norwood: Well, does that apply to the Government bids, too?

The Witness: Oh, yes, Your Honor, it applies to all purchasers.

By Mr. Withrow:

Q. Mr. Warren, is it important for the Bessemer Company to know in advance, if possible, what quantity of cement it will be required to produce and ship under a contract?

A. Very important.

Q. And, in connection with your contracts with the Federal Government, do you make any effort to find out from them what amounts will be shipped, and when shipments will be required?

A. We do.

32150 Q. Now, would you tell us the reasons for wanting to know in advance the proposed shipping schedules, or requirements, of the Federal Government in connection with one of its purchases from you?

A. Well, the question of storage is a big problem with us there, because we have to make this cement and provide bins to hold it, and then the Government comes and samples those bins after they are filled, and seals them, top and bottom. They run tests on those samples, and
32151 at the end of a period, maybe 45 to 60 days, and in emergency cases maybe a little less, they advise us that the bin has been accepted as complying with the contract requirements, and then it is held there until we are instructed to ship.

It can just get you terribly tied up with your storage capacity if you hold that in the bin any longer than is absolutely necessary. One of these contracts can tie up an awful lot of storage space, and inconvenience you in the handling of your relationships with your normal day-to-day customers. Consequently, we want to get that period just as short as we possibly can, and we know, from experience, that at the very best it runs way beyond what you would normally think it would.

Q. Did you follow this procedure in connection with the shipments which you made to the Tygart River Reservoir Dam?

A. We did that, yes.

32154 Q. Mr. Warren, has there ever been, since you have been with the Bessemer Company, a request to bid that you did not answer because there was no commitment on the Federal Government to purchase cement?

A. Yes.

Q. Could you give us one of those instances, if you can recall a specific one?

A. Well, this one we were just talking about be-
32155 fore the recess was one of those.

Q. By that you mean Respondents' Exhibit 2305-A to R, inclusive (showing document to witness)?

A. That's right.

Q. Now, do you recall the so-called Good Friday bids of April 15, 1938?

A. I do.

Q. Did you bid on that inquiry?

A. No.

Q. And when I refer to the Good Friday bids, did you understand I was referring to this invitation, Commission's Exhibit 1339 (handing document to witness)?

A. This is it.

Q. Would you tell me whether or not the same reasons applied to your decision not to bid—did or did not the same reasons apply to a decision not to bid on Commission's Exhibit 1339 as you have already stated applied to Respondents' Exhibit 2305-A to R, inclusive?

(Witness examines Commissions' Exhibit 1339.)

A. Well, this one here came to us before the
32156 other one, I believe, and this is the one that I studied most, but there would be the same reasons, and I don't think I gave them all.

Q. Would you tell us what additional reasons there were in connection with this Commission's Exhibit 1339 that you have not already mentioned with reference to Respondents' Exhibits 2305-A to R?

A. Well, one of the bases that they provided in this bid as a thing that would finally determine the point from which they would ship, was the actual cost to the Government at the point of use. The invitation provided that they would take bids, that they would run a preliminary elimination contest, and take bids in these various zones, and then pick one mill from each of the zones; but they did not promise the winner any business definitely, they promised him that he would then be put in competition with the winner in surrounding zones, and the fellow that comes to the point of use at the lowest cost to the Government would then be the winner.

Now, that provision set up a lot of trends of thought in my mind. In the first place, I recalled the requirement that we have at least accepted as a fixed one, in all my experience in bidding to the Government, that the Government should buy at the lowest cost to it in accepting bids, and it occurred to me that if we were at one part of a zone, and some other bidder was at another part of a zone, we might
have a bid which was a penny or two or three lower
32157 than his, but when the time came to actually ship the cement that might go to a point near him, or beyond him, which, when there was added to his bid price, the cost of transportation, might show a lower cost to the Government than would be shown from our mill. That is as I pictured it one condition that might exist, and, if it did, then the Government would not actually be buying at its lowest cost.

And I recalled the name of McCarl, and statements that

were made—that were attributed to him in the papers that if the Government—

32158 A. (Resumed.) I recalled statements to the effect that if it developed that buyers for the Government had failed to comply with the law, the Government had no obligation to pay, they could refuse to pay,

32159 and I just pictured ourselves with a thing that might involve us with all the cement that we could make for the period, as a basis, of going through all that work and eventually being in a fix where we might not be able to get our money, even, and it looked like too dangerous a thing to even consider as a possibility.

In the second place, I felt that the Government was not being quite fair with us in their running of that preliminary contest, limiting our right to bid, to be considered for the cement that they actually wanted at the point they wanted. We might enter the competition and be eliminated for lack of proper information, and their—the documents made it very clear that they were not interested actually in their cost at our mill; they were interested in their cost at the point of use, and I just thought that if we yielded to that pressure once we might—and it was tremendous pressure; it looked like a tremendous volume of business—that if we gave in to that it might lead us into practices that would—deny us our basic rights of competition, and the right to compete with all of the information that we considered essential to compete.

My point is, that I want to get in there and fight just as hard as I can fight for this business, with all of the information that I can get that is going to influence the buyer's mind, and I feel that as a seller I have that right, and I feel that this bid denied me that right.

By Mr. Withrow:

32160 Q. Have you finished?

A. Yes.

Q. Mr. Warren, did you, or anyone connected with your company, discuss this Good Friday bid with any dealers prior to your decision, or at the time of your decision, not to bid?

A. We had quite a number of calls from customers, many of them came directly to me, others came to me through our salesmen or through our sales office manager, asking were we going to bid—or saying I hope you don't—

undertaking to—or I assumed that they were trying to influence us not to bid.

Q. Did your salesmen ever inform you that dealers talked to them in the same tone that you have just described, concerning these Good Friday bids?

A. They did.

The witness identified Resp. Ex. 2307 A to Z as an invi-
tation to bid which he received from the United
32161 States Government. The material written in is a
copy of Bessemer's bid in answer to that inquiry.

Q. Now, would you tell me if subsequent to the letting of that Good Friday letting, April, 1938, you made any f. o. b. mill bids to the United States Government?

A. It is a little hard for me to answer that question "yes" or "no." We made a bid to the Government at destination and allowed them the right to buy at our mill by deducting the freight.

Q. Well, I show you Respondents' Exhibit 2307-A to Z, and ask you if that is copy of the bid, of the instance you just referred to?

A. That is right.

Q. And when you say you allowed them to deduct the freight, I direct your attention to Respondents' Exhibit 2307-M, and ask you if the third paragraph from the bottom is the paragraph you refer to as giving the Government the benefit of a mill price by deducting the commercial freight rate to destination?

A. It is.

32167 (RESP. EX. 2307-A to 2307-Z was offered and received in evidence.)

By Mr. Withrow:

32168 Q. Mr. Warren, would you just state to us briefly why you were willing to bid on this inquiry, Respondents' Exhibit 2307, and as against your refusal to bid on Commission's Exhibit 1339?

A. This represented the specific quantity of cement to be purchased by a group of the Government—department of the Government with whom we had had some very fine experiences; we knew with our experience with them that we could depend on the best that they could give us as to when we would be required to ship, at what rate we would be required to ship. We could hope for a very satisfactory

relationship, and it would leave us a thing that we could readily handle without interfering with our regular customers, our regular trade.

Q. Now, Mr. Warren, I would like to show you again Respondents' Exhibit 2306-A to D, and ask you if this is a file of material concerning the same bid as Respondents' Exhibit 2307-A to Z?

A. Oh, it is.

Q. Did the Federal Government inform you or the Bureau of the Federal Government inform you as to
32169 what your shipping schedule would be after you received part of the award of this award, Respondents' Exhibit 2307?

A. We were told that we would be third shippers, to ship our share after two others had completed theirs.

Q. And did they give you any information as to when your shipments would start?

A. They have from time to time posted us as to their best judgment as to when we would be called upon to start.

Q. And at the time you made bids in response to Respondents' Exhibit 2307, did you know at what point the cement was going to be used covered by the invitation?

A. We did.

Q. Have you had any requests from customers other than governmental bodies asking for quotations f. o. b. mill?

A. I am quite certain we have never had a request from any other than the governmental body.

Q. Did you ever consider offering to sell to commercial customers on the basis of f. o. b. mill basis?

A. Yes.

Q. Would you tell us your reasons for not making such an offer to commercial customers?

A. There are a good many reasons.

Q. Just outline them for us.

A. We are wholesalers. Our manner of distributing is as wholesalers, and we adhere to that as best we can.
32170 My studies lead me to believe if you step into a position of selling f. o. b. mill you would take on the first characteristic of a retailer, you would tie yourself to that one point of doing business, and I cannot find any reason to think that we could succeed. I am afraid that we would fail terribly if we tried to step into that role. It would—in

the first place, we have built up this distributing organization of dealers throughout our entire shipping area, and my experience leads me to think that if we start selling f. o. b. mill we will undermine all that work, leave ourselves in a position where our dealer organization loses faith in us, and if they leave us then we would be faced with a job of finding our own way into those markets, into our own outlets, and at other points. If we were to retain the trade at these points where we now do business, and if we were to make an effort by setting up an f. o. b. mill selling, dealers would leave us, and I am sure we would find ourselves eventually where we had to go in there and establish warehouses, and offices, and man them at tremendous expense. It would cost us much more to get our cement into the hands of the users than it does under our present method; selling f. o. b. mill runs you right back to where there is only one place to compete. I picture myself with my wrist chained to those kilns, just held right there. We cannot get out and compete with our competitors at the points where the business is if we set in to selling f. o. b. the mill.

32171 Q. Mr. Warren, since you have been connected with the Bessemer Company, do you know of any instance where the Federal Government has purchased—where the purchase cost—at which the Federal Gov-
32171 ernment has purchased is not the lowest cost at destination as against some lowest available mill price, or some other basis?

A. Every purchase I have ever known anything about they have bought at their lowest cost.

Q. At destination?

A. At destination.

32173 Q. Now, are there any land-grant rates in the territory where you do business?

A. No.

Q. Have there ever been any special rates for use by the United States Government in connection with any of the projects on which you bid to the United States Government?

A. Special rates for the Government?

Q. Yes.

A. No.

Q. Would you tell us if you have entered into any agreement concerning the use or non-use of land-grant rates in connection with bids to the Federal Government?

A. No.

32174 Q. Have you ever used a so-called control clause in one of your bids to the Federal Government concerning land-grant rates?

A. No.

Q. Do you come in competition with imported cement?

A. No.

Q. Have you ever entered into any agreement with any manufacturers to restrict the sale of imported cement?

A. No.

Q. What are your terms of sale at the present time, Mr. Warren?

A. Net cash 30 days, discount of 10 cents a barrel for payment in cash within 15 days from the date of shipment.

Q. Is the invoice dated the same day as the date of shipment?

32175 A. We use those two terms interchangeably, date of shipment and date of invoice.

Q. Are these the terms, cash terms, which have been in effect since you have been connected with the Bessemer Company?

A. They are.

Q. Do you have any agreement with any of your competitors to use those terms of sale?

A. No.

Q. Would you be free to vary those terms, if you wanted to?

A. Yes, I would.

Q. Mr. Warren, I show you Respondents' Exhibit, for identification 2308-A to N, and, in order to save time I will ask you if all of these papers were the papers prepared in or received by your office, and whether or not they were prepared and received in the regular course of doing business with the Bessemer Company (handing documents to witness)?

A. Yes.

Q. Now, Mr. Warren, did an occasion ever arise where you had to change the wording of your terms of sale

32176 because of change in wording by your competitors?

A. Yes.

Q. Would you tell us briefly about that situation, what it amounted to?

A. It was a bid to the Government at Chillicothe, I think it was a reformatory, United States reformatory, and we had been bidding these terms—I think we had bid them more than once on those same terms, and it had not been considered, and our representative there who called to give us the information on the bidding, reported that there was some objection to our statement "15 days from date of shipment," or from date of invoice, and that our bid had been thrown out because of that, and he said if we would bid, just say "discount 15 days" that we would likely get consideration, so we adopted that practice.

Q. And would you tell whether or not after having changed the wording of your terms and conditions of sale, whether or not you found that you were considered?

A. Yes, we were considered.

Q. Mr. Warren, I show you Respondents' Exhibit 2308-G, and ask you if that is the report which you received from your salesmen to which you just referred about that bid?

A. That is the report.

32178 Trial Examiner Norwood: This explains the reason why you changed your policy in this respect?

The Witness: That is right.

(RESP. EX. 2308-G, was offered and received in evidence.)

32180 By Mr. Withrow:

Q. Mr. Warren, what is the primary outlet for the distribution of your cement?

A. The dealers that we sell to.

Q. When you speak of a dealer, what sort of requirement do you have in mind for a person to be a dealer?

A. A dealer is a man who devotes the major portion of his time and effort to the sale of cement, and oftentimes other building material; a man who has a place of business where he can store the product, and who after we have looked him over carefully looks like a man who can accomplish the things we want accomplished in his locality,—that is, sell our cement, pay our bills.

Q. Well, is there any hard and fast rule by which you select your dealers?

A. No, there is not.

Q. Do you use, or have you ever announced to the trade a definition of what constitutes a dealer since you have been with the Bessemer Company?

32181 A. No.

Q. Who, in your organization, Mr. Warren, decides whether an individual person or company can be a dealer for the Bessemer Company, or will be solicited as a dealer for the Bessemer Company?

A. The salesman in the territory may decide that
32182 by himself; oftentimes he does. Occasionally he will refer that to the office for consultation. At times it comes to my attention, and it is decided by one, or by two, or by three of us, depending upon the circumstances.

Q. Do many dealers handle Bessemer cement exclusively?

A. There are a good number.

Q. Well, do many handle other brands, as well as the Bessemer brand of cement?

A. A great many more of them handle many brands than handle our brand alone.

Q. Are there any instances where you serve a man as a dealer although to your knowledge he is not sold by any of your competitors as a dealer, or solicited by your competitors as a dealer?

A. Well, I don't know, of course, about the solicitation from others. There are quite a few cases that I am sure that we sell them and others don't.

Q. Does anyone outside of the Bessemer Company have anything to do with determining which persons you will sell as dealers, and which you will not?

A. No.

Q. Since you have been with the Bessemer Company have you ever received letters from dealers' associations asking you to sell only to persons who may be called the legitimate dealer?

A. Never have seen such a letter.

32183 Q. Do you sell, Mr. Warren, only to members of the dealers' associations, or dealer association?

A. I am sure we sell a great many of them both—a great many of both.

Trial Examiner Norwood: Both what?

The Witness: The association members and non-association members, Your Honor.

By Mr. Withrow:

Q. Now, in determining whether a given applicant can qualify as one of your dealers do you take into consideration the size of the town in which he is located?

A. We do.

32185 Q. Mr. Warren, is your policy with reference to selection of your dealers arrived at independently of your competitors?

A. It is.

Q. Is it arrived at independently of dealer associations?

A. It is.

Q. Would you just tell us, briefly, Mr. Warren, how you arrive at and how you apply the concept of a dealer employed by the Bessemer Company, in connection with the decision by the Bessemer Company to sell or not to sell a prospective dealer?

A. Well, this is very much of a phantom problem, as far as we are concerned; our effort is to sell as much
32186 and as many as we can. We don't have to decide who we won't sell; what we try to do is to find people that we can sell, people that will buy from us.

Now, I don't recall cases of people asking us to sell them after—if we go into this—

Trial Examiner Norwood: Do you select people that comply with the conditions that you have heretofore stated to us?

The Witness: Your Honor, we go into a town, and if a fellow has a place of business that looks to us like he can handle cement, why, we go and talk to him.

Trial Examiner Norwood: Yes.

The Witness: And if we find that he can pay his bills, has a good record in his community, acts like a business man, why, we try to deal with him.

By Mr. Withrow:

Q. Mr. Warren, how does the volume of sales which you make through dealers compare with the volume of sales made to other persons?

A. A great majority of our business goes through the dealers.

32187 Q. To whom else do you sell besides dealers?

A. We sell to the Federal Government and to railroads, contractors on highway work.

Q. Now, on these sales to the Federal Government have there been a great number of such sales to the Federal Government?

A. Not many.

Q. What service does he perform?

Mr. MacIntyre: Now, I object, unless it be shown that the man who is supposed to be rendering the service was in fact rendering the service for the company and
32188 not for himself or the purchaser of the cement after he has purchased the cement from the company. It is confused.

Trial Examiner Norwood: We have abundant information on the subject and this does not go to any special situation here with respect to this Respondent. I think that I simply will reject it as cumulative.

Mr. Withrow: Well, Your Honor, one of the charges in the complaint that this Respondent has to meet is the charge that he has agreed to restrict sales to dealers.

Trial Examiner Norwood: He has covered that.

Mr. Withrow: He has not. He has not testified one single word about it, Your Honor.

Trial Examiner Norwood: Off the record.

(There was a discussion off the record.)

Trial Examiner Norwood: Objection sustained.

Mr. Withrow: I offer to prove through this witness that the dealers of the Bessemer Limestone and Cement Company, an Ohio corporation, provide facilities for local storage and delivery to the ultimate consumer, they handle the credit risk of the small sales to the ultimate consumer, they engage in the promotion of the use of Bessemer cement in the locality where they are located, all of which things are in addition to the services which the Bessemer Company can provide and does provide at the location of these individual dealers.

32189 I further offer to prove that without the services performed by the dealers on such business, the Bessemer Company would have to perform similar services at considerable expense or else retire from the market, and that the Bessemer Company in promoting dealer sales has done so believing that it could not deliver cement to the hands of the ultimate consumer as cheaply or as advantageously as it now does through its dealer outlets.

I further offer to prove that the Bessemer Company is engaged in the wholesale business and is not equipped to handle retail sales of Portland cement at their numerous destinations at which it has dealers and sells through dealers.

That completes my offer of proof.

Mr. Paulson: I move the offer of proof be deleted from the record. Counsel had adequate profection in his question which objection was sustained to, to get all those details in the record.

Trial Examiner Norwood: The motion is denied. Some of the proffer there has already been shown and the most of it is cumulative; some of it is irrelevant, but I want the proffer to stay there so that the Counsel has his exception and give him the benefit of having proven that, and saving some time.

32190 Mr. Paulson: My point is, of course, he has all those benefits when he has had the privilege of asking the question and having the objection sustained for the relevancy to the nature of the line appearing from the question, and that is all that an offer of proof goes to.

Trial Examiner Norwood: If the Counsel desires, I shall make this of my own motion, but if the Counsel desires the Respondent to go ahead and prove any particular parts of that contained in the proffer he may do so.

Mr. Paulson: No, sir; no, no. I move that the whole offer be deleted because it is a wasteful procedure.

Trial Examiner Norwood: The motion is denied.

By Mr. Withrow:

Q. Mr. Warren, since you have been connected with the Bessemer Limestone and Cement Company, has that company ever issued an announcement to its dealer trade classifying the types of business it sells through
32191 dealers and the types it sells direct?

A. No.

Q. Now, has there been a major change in the types and class of business that you sell to dealers and sell directly, since you have come with the Bessemer Company?

A. There have been one quite important change.

Q. Will you tell us what that change is?

A. For a long time after I came we sold cement for the use of W. P. A. always only through the dealers. That is, we tried to sell it through the dealers, and we have now changed that policy, as far as the purchase by the W. P. A.

office in Ohio is concerned, and we bid directly to them, and have sold them.

Q. Would you tell us the circumstances under which that change came about?

A. It goes back for at least a year prior to the summer of 1939, and I believe it was the summer of 1938.

On reading tabulations of bids taken by W. P. A. at Columbus, we found that some of the cement manufacturers were bidding directly, largely being bid by dealers, and there was one very big letting, in which—at least one, and I think two or more manufacturers—bid direct. That was followed—I mean the manufacturers bid in competition with dealers. That was followed later on by a few smaller direct bids. I might add there that those purchases, at
32192 that time, covered almost the entire requirements of the W. P. A. in Ohio for quite a long period, but we observed on those reports that other manufacturers continued to bid directly, and we were not getting any of the business at all. We still felt that it was a class of work that the dealers were qualified to handle, and our dealers were insisting to us that it was, making quite clear their beliefs that if we undertook to bid that work that they would consider us—they told us that they would consider us as being in competition with them, taking their market, and we continued with our former policy of bidding, and we were not getting any business.

In the spring of 1939 there was again an inquiry for several very large lots to be taken on two successive days, and to be delivered to quite a number of different points throughout the State, and the first day—on that first day's letting we undertook to get dealers to put in bids that would be on our brand, permit us to ship.

We did not bid, and quite a good number of manufacturers did bid direct; I have forgotten how many; and after that bid was in we studied it very intensively for several hours, and finally decided that there was a big lot to be bid in Cleveland the next day, and we made out our bid and filed that bid with the W. P. A. That was our first instance of bidding direct on that work.

And other inquiries that followed, we bid them, generally, wherever they came up. I don't think we
32193 have bid on every inquiry, but we have bid on generally every inquiry that we have received.

32197. Q. Mr. Warren, between the time when the first one of your competitors sold W. P. A., the time in

Ohio? and the time you began selling direct, did you receive any comment or expression of opinion from your dealer customers as to direct sales to W. P. A.?

A. We did.

Q. And what did these dealers tell you—tell the Bessemer Company?

A. They told us if we expected to continue to enjoy their good will it would be advisable not to compete with them in bidding direct.

Trial Examiner Norwood: Did they tell you that
32198 these other competitors had changed their policy?

The Witness: Well, Judge, they may have told us or we may have told them; it was something of each.

By Mr. Withrow:

Q. And did this affect in any way the comments by your dealers—did that affect in any way the action which you took, Mr. Warren?

A. It did.

Q. In what manner did it affect your action?

A. It caused us to refrain from bidding to the Government on work of that kind.

Q. If there was any reaction from your dealers when you commenced to bid direct, will you tell us what that reaction was, what they told you?

32199 The Witness: There have been several instances where they continued to object pretty strenuously to our bidding. And other cases where they have made clear their appreciation of the effort we made in holding off, and expressed the opinion that they could not blame us; it was not a thing we started.

Q. Now, when you started to sell direct to W. P. A., was that the result of any agreement with any of your competitors?

A. No, sir.

Q. Now, you have been testifying, Mr. Warren, about W. P. A. sales in Ohio. Have you ever quoted direct to the W. P. A. in West Virginia?

A. We have.

The witness identified Resp. Exs. 2312 through
32200 2319 as all referring to a transaction. One is correspondence between Bessemer's office and its West Virginia salesman; also a bid blank, a copy of bid to the Treasury Department Procurement Office of Charleston, W. Va.; the figuring sheet; another bid blank unfilled; and things to do with that; and correspondence about those

requests to bid; and the bid. The handwriting appearing at the bottom of Resp. Ex. 2312 is that of A. E. Harpold, Bessemer's West Virginia representative. The same
32201 applies to the handwriting on Resp. Exs. 2317, 2318 A and C, and 2319 A. The information contained in Resp. Exs. 2312 to 2315 and 2317 to 2319 is the information that Bessemer had and on which it acted in connection with its W. P. A. policy for sales in West Virginia.
32208 (RESP. EXS. 2312, 2313, 2314, 2315, 2317, 2318-A to D, and 2319-A to E, were offered and received in evidence.)

By Mr. Withrow:

Q. I want to ask you, Mr. Warren, whether or not you adopted the policy, W. P. A. policy, which you now have in the State of West Virginia, as the result of any agreement with your competitors?

A. We had no agreement.

Resp. Exs. 2318 and 2319 are enclosures referred to in Resp. Ex. 2317.

32209 Q. Now, Mr. Warren, when a question comes up in some town, whether the Bessemer Company will sell someone directly or whether it will sell through the Bessemer dealer located at that town, who decides—who interprets your company's policy as to whether that sale will be made direct, or not,—by the Bessemer Company?

A. Well, every one of us in the sales department makes such a decision at some time or other.

32213 Q. Mr. Warren, if you know, will you tell us whether or not you bid on that inquiry of the National Park Service which you have there?

Trial Examiner Norwood: Is this some bid about which the Commission has put in evidence?

Mr. Withrow: No, Your Honor.

Trial Examiner Norwood: Off the record.

(There was a discussion off the record.)

Trial Examiner Norwood: On the record.

A. We did not bid.

Trial Examiner Norwood: Answer the question.

A. We did not bid.

By Mr. Withrow:

Q. Did you bid on the inquiry there referred to as the Akron Metropolitan Park Board?

A. No

Trial Examiner Norwood: Now, what do you
32214 want to show by bringing out information about some bids that are not covered by the complaint?

Mr. Withrow: The only interest I have is I would like to bring out that although the destinations at which these bids call for the delivery of cement are in the territory where this witness normally markets cement, he did not bid, and get the reasons why he did not bid, and then to show—point out his competitors did bid, or some of them did bid, showing the differences in policy of this company with reference to certain inquiries as distinguished from the policies of some of his competitors. It has a bearing—the independent action of this Respondent—and they are entitled to put that in, I believe, in order to show that they did not have a uniform agreed-upon classification of business. It demonstrates—

Mr. MacIntyre: May I inquire as to the date of the witness.

Trial Examiner Norwood: What is the date covered by that?

The Witness: These were generally in August, 1938.

Trial Examiner Norwood: Was that after the complaint?

Mr. MacIntyre: More than a year after the complaint was issued.

Mr. Withrow: The Commission, of course, put in
32215 invitations to bid subsequent to August, 1938, Your Honor.

Trial Examiner Norwood: Proceed.

Mr. Withrow: Your Honor, I offer in evidence at this time these papers, Respondents' Exhibits 2321 through 2328-A to M. I believe that is the most expeditious way.

Trial Examiner Norwood: As I understand, they show that you have a policy different from competitors', in 1938?

Mr. Withrow: Yes, that is right.

Mr. MacIntyre: The entire offer of this batch, hands full of papers, is objected to as incompetent, irrelevant, and immaterial; cumulative.

Trial Examiner Norwood: The objection is sustained.

By Mr. Withrow:

Q. Mr. Warren, I would like to ask you if in these, in the interest of the National Park Service and Akron Metropolitan Park Board, you found out after the bids were

opened on these two inquiries some of your competitors had bid?

Trial Examiner Norwood: Now, that is a bid covering the time there that is covered by those papers?

Mr. Withrow: Yes, Your Honor.

Trial Examiner Norwood: 1938?

Mr. Withrow: Yes, Your Honor.

Mr. MacIntyre: It is a matter now, if Your
32216 Honor please, of attempting to get in through oral testimony what you just rejected through these hand full of papers. It is irrelevant, immaterial, and cumulative.

Trial Examiner Norwood: The objection is sustained.

Mr. Withrow: Is it on the ground that that is subsequent to the time of the complaint?

Trial Examiner Norwood: On the ground that it is irrelevant and immaterial and incompetent.

Mr. Withrow: Well, I offer to prove through this witness, and through the documents, Respondents' Exhibit 2321—

Trial Examiner Norwood: Now, the documents show for themselves.

Mr. Withrow: Could I complete my offer of proof, Your Honor? I was not going to paraphrase the documents.

Trial Examiner Norwood: All right. Go ahead.

Mr. Withrow: I offer to prove through this witness, and through testimony based upon documents, Respondents' Exhibits 2321 to 2328, inclusive, and through oral testimony, that this Respondent found that some of his competitors bid, on an inquiry from the United States Department of the Interior for the C. C. C. requirements in August, 1938, and on the Metropolitan Park Board letting of Akron in August, 1938; that this Respondent did
not bid; that at the time the Bessemer made its
32217 bids to the United States Department of the Interior it had knowledge in advance that on previous inquiries after the bids were opened the bids showed that some of his competitors had quoted direct, but that the Bessemer Limestone and Cement Company decided in each of these inquiries independently that it would not bid because of the adverse effect which it believed it would have upon future dealer business and relations between the Bessemer Limestone and Cement Company and its dealer customers.

Trial Examiner Norwood: Counsel has an exception on the rejection of that.

By Mr. Withrow:

Q. Mr. Warren, do you employ water shipments at any place in the area where you market cement?

A. No.

Q. Well, is water transportation readily available to you from your mill at Walford?

A. No.

32218 Q. Well, in order, Mr. Warren, for you to reach any water on which you could ship cement, would there have to be a previous rail or truck haul?

A. There would be.

Q. What would be the nearest location or what is the nearest location from which you could make a water haul after you made a previous haul to that point?

A. You mean the location of water with respect to us, navigable water?

Q. Yes.

A. About, probably 40 miles to the south of us, and Lake Erie, of course, is north of us, 90 miles or 100.

Q. Well, would you tell us whether you have ever considered making any shipments by water in order to save cost in getting cement to any destinations where you sell cement?

A. Never have.

Q. Do you compete with manufacturers who do use water transportation?

32219 A. Some of the manufacturers we compete with I have been told do use water transportation. I do not know that of my personal knowledge.

Q. Well, have you entered into any agreement with any manufacturers to the effect that you should not use water transportation?

A. No.

Q. Have you ever, Mr. Warren, since you have been connected with the Bessemer Company, agreed with any of your competitors to allocate business among cement companies?

A. No.

Q. Have you ever agreed, Mr. Warren, with any of your competitors not to ship more than a certain percentage of your capacity in any given year?

A. No.

32223 Q. Would you tell us, Mr. Warren, when you came with the Bessemer Company?

A. I joined them on August 1, 1936.

Q. Has the Bessemer Company been a member of The Cement Institute ever since you have been connected with the Bessemer Company?

A. It has.

Q. Would you tell me whether or not the Besse-
32224 mer Limestone and Cement Company has been a member ever since it became a cement seller in July, 1935?

A. It has.

Q. Now, Mr. Warren, since you became vice-president in charge of sales, in December, 1936, would you tell me whether or not you have considered the question of whether you should maintain your membership in The Cement Institute?

A. Yes.

Q. And what was your decision?

A. We decided to continue the membership.

Q. And would you tell us what reasons you had for maintaining your membership in The Cement Institute?

A. There are certain statistical services that they render us, and we find the freight books which we use, those services are very economical to us, most economical way we can get them, that I know of.

Q. Well, Mr. Warren, you said that you get certain statistical services. Would you tell me whether or not the man in charge of operations connected with the Bessemer Company has any use for that statistical information?

A. I don't know that he uses it directly. He uses—it may at times influence the opinions that we give to him; I think it does.

32225 Q. Now, would you tell us, just briefly, in what way you use the statistical information, if you use it?

A. It is a sort of a gauge to accumulate, in one place, handily, comparative data as to what the construction industry has been doing, the progress. Now, it is largely information that is available to us in other forms, but this consolidates it, and we find out what the total building has been this year and last year, and what may be ahead for us. I use it, personally, as a means of keeping aware of what is going on in the industry that I am in.

Q. Did you subscribe to any other statistical services besides The Cement Institute?

A. Oh, yes, we have a great many of them.

Q. Now, there has been a great deal of testimony in this case, Mr. Warren, about a Compendium of Established Trade Customs and Marketing Practices. Are you familiar with that Compendium?

A. I never heard of it.

Q. Have you ever attended any meetings of The Cement Institute?

A. Yes.

Q. Take the period from, when you came with the company, and up to, say, July, 1937—did you attend any national meetings of the Institute during that period?

A. What period?

32226 Q. From the time you came with the Bessemer Company, until July 1, 1937.

A. Now, Mr. Withrow, I believe I did, but I am not sure.

Q. I use the date "July 1, 1937" as being the day before the complaint was issued in this case. Would that refresh your recollection as to whether or not you attended any meeting during that period, before you came with the Bessemer Company, until this complaint was issued in this case?

A. Well, I just don't recall.

Q. Now, did you attend any district meetings during that same period, if you know?

A. Yes, I think I did, Mr. Withrow; I am pretty sure I did.

Q. Were there very many meetings, district meetings, that you attended?

A. Oh, no, no.

Q. Would you tell us, if you recall, what took place in any district meetings of The Cement Institute, that you attended?

A. I would like to explain my answer a little bit. I came there in the summer of 1936 with no experience whatsoever in the cement business, and shortly after I came Charles Schmutz died, and he was the man that would have guided me in—

Trial Examiner Norwood: Now, you need not tell all of those details. You just tell what took place at the meeting.

The Witness: Your Honor, my memory is en-

32227 tirely confused about it.

Trial Examiner Norwood: Yes.

The Witness: I have no distinct memory about the—

Trial Examiner Norwood: Well, that is the answer.
The Witness: —those early days there.

By Mr. Withrow:

Q. Well, would you tell us whether or not there were any agreements with reference to price entered into at any of those Institute meetings, if you recall? If you do not recall, just tell us so.

A. Well, I didn't make any agreements about price.

Q. Well, in so far as you are concerned in the Bessemer Company, would you tell us whether or not The Cement Institute has done anything to control or regulate the price which you quote for cement?

A. They haven't done anything.

32228 Q. Have you ever been an officer or director of The Cement Institute?

A. No.

Q. Since you have been with the company, has any employee or officer of the Bessemer Limestone and Cement Company been trustee or officer of the Institute?

A. No.

Q. Have you ever served on a committee of The Cement Institute?

A. No.

Q. Since you have been with the Bessemer Company has any officer or director or employee of the company served on a committee of The Cement Institute?

A. No.

32232 Trial Examiner Norwood: The objection is sustained.

Now, we have discussed with Counsel the matter of adjournment over.

I understand that Counsel for the Commission object to a recess over next week. The Counsel for the Respondents have urged it here, as shown by the record.

32235 Washington, D. C.,
Tuesday, February 13, 1940.

32252 F. B. WARREN thereupon resumed the stand and testified further as follows:

Direct Examination (Continued) by Mr. Withrow.

Q. Mr. Warren, is there any trucking from your mill at the present time?

A. Yes.

Q. What are the circumstances under which you ship cement by truck?

A. We do that to meet the demands of the market in the Cleveland area, where competitors offer truck delivery.

Q. Well, who owns the trucks, the Bessemer Company, the customer, or some common carrier?

A. It is a contract carrier.

Q. You mentioned Cleveland. Do you also truck around Toledo or any of that territory?

A. We do very little over there.

Q. Now, when you ship by rail, or ship by truck into the Cleveland area, do you charge the same destination
32253 prices for both of these services?

A. Yes.

Trial Examiner Norwood: I want to suggest to the Counsel that those cases of shipping by truck, and charging the destination price based on rail, are not relevant in this case so far as it may be considered rebuttal evidence.

Mr. Withrow: Your Honor, Counsel—

Trial Examiner Norwood: I think we have had—we know that situation throughout. Now, if you have cases where you did not—you shipped by truck and did not base it on rail, or the delivery was made to trucks at the mill on an f.o.b. mill price, that meets directly and tends to controvert and contradict the testimony put in by the Commission, and I do not see any use of wasting any time by asking him if they shipped by truck here and charged delivered prices on a rail basis.

Mr. Withrow: Well, Your Honor, as part of the proof that the Commission maintains is binding on the
32254 Bessemer Company is proof concerning the precise practices of the predecessor corporation, the Bes-

semer Company, both in the form of exhibits and oral testimony of the sales manager of that company who was a witness on behalf of the Government.

The only way we can explain that situation is to go into the trucking practices, and, furthermore, I would like to point out to Your Honor that there is no testimony as yet on the record that the destination price which this man quotes at Cleveland is based on rail or based on trucking, or anything. We haven't even gotten to that point. He said the price he charged was the same, but there is no testimony as to what it was based on.

Trial Examiner Norwood: Well, I was not referring particularly to this witness. I was just pointing out certain subjects that have been developed repeatedly, and a great many times, that are of no further use in this case.

Go ahead.

Mr. Withrow: Well, Your Honor—

Trial Examiner Norwood: Go ahead.

Mr. Withrow: Well—

By Mr. Withrow:

Q. Now, Mr. Warren, in the territory to which you now truck, do you have any savings in those territories
32255 by virtue of sending by truck as against shipping by rail?

A. No.

Q. Would you tell us whether you have checked individual sales to ascertain whether or not your answer was correct about savings?

A. Yes, we have checked it regularly.

Q. Well, could you—

A. You mean do we know our cost by truck, and our cost by rail? We do.

32257 Trial Examiner Norwood: Did you testify as to your own knowledge concerning the costs of savings resulting from shipping by truck or rail?

The Witness: I did.

By Mr. Withrow:

Q. Well, Mr. Warren, can you, if you can recall any—would you give us an example of how it worked out that it cost you more to truck cement to some destinations where you shipped as against the cost of rail?

A. The rates that we paid the trucking contractor have

varied from even with rail rates to considerably above rail rates. In no case have they been below.

The size of a sale in truck lots is approximately half the size of a sale in carlots. We have the extra handling of those orders, the billing, and the very big item of solicitation, extra on trucks as compared to car lots.

Q. Mr. Warren, have there ever been any in-
32258 stances where you refused to ship to a customer by truck because it cost you more than it cost you to ship it to him by rail?

A. Yes.

Q. Now, this contract carrier that you have, are these trucking rates filed with the Ohio Public Service Commission?

A. They are.

Q. And who sets the rates,—do you in contracting with your carrier, or does the Ohio Public Service Commission?

A. The carrier submits them to us, we reach an agreement between ourselves, which is made subject to approval of the Commission. That's, I believe, the Interstate Commerce Commission.

Q. Now, are these trucks, which you use, especially designed to truck cement?

A. Yes.

Q. Will you tell us, if you know, when you make a shipment by truck, say to Toledo or to the Cleveland area, do those trucks come back with a load from Cleveland to your mill, or do they come back empty?

A. The regulations under which they operate limit them to handling only for contract carriers. It is very difficult, under those conditions, for them to get a return load.

Trial Examiner Norwood: What is that? What regulation is that? A State regulation or Interstate Commerce regulation?

32259 The Witness: I believe, Your Honor, that is an Interstate Commerce Commission, — the definition between contract carriers and common carriers.

32260 Q. Now, if you know, Mr. Warren, would you tell us how the cost per barrel of loading cement on trucks compares with the cost per barrel of loading on rail cars—

Mr. MacIntyre: I object.

Q. (Continuing)—to the Bessemer?

Mr. MacIntyre: The witness has stated that it is not reflected in its price, and unless it is we object to any further information of that type being brought out.

Trial Examiner Norwood: You are trying to show that they make nothing extra through the operation of their trucks, are you not?

Mr. Withrow: Your Honor, one of the things we have been accused of in this case is not passing on to the consumer the savings from the use of trucks. Now, I am only showing that there are no savings.

If Counsel for the Commission is now willing to stipulate that there is no issue in this case about passing on the savings by virtue of using trucks as compared with rail, I will certainly desist from this line of inquiry, both from this witness and in the future.

Trial Examiner Norwood: Now, you are trying to show here that there is in truth and in fact one white swan, and that the necessary application is that there is not one or two or half a dozen or a substantial number of
32261 black swans?

Mr. Withrow: No. I do not think that is a fair description, Your Honor.

The contention by the Commission is that we have conspired to use one situation which deprives the consumer of a lot of benefits. Now, one of the benefits that they talk about is this trucking. They say that we do not let them make delivery by truck at all, but if we do we deprive them of a saving in cost.

Now, at the present time, I am showing, first, that they do truck, and, second, that there is not a saving in cost.

Mr. MacIntyre: If your Honor please, they are not meeting the issue at all. We put in evidence showing that the Bessemer Cement Corporation in 1932 and '31 compelled the discontinuance of trucking as of that time. The mere fact that the Bessemer Limestone and Cement Company had permitted trucking on a certain restricted basis does not meet the evidence that it has compelled, or at least one of its previously affiliated companies compelled the discontinuance of trucking six years ago.

Trial Examiner Norwood: Well, he is offering evidence that goes to another point than the one you are speaking about, it seems to me.

Mr. Withrow: I think that is right, Your Honor.

2262 Mr. MacIntyre: Well, he does not meet, though, the cost of that trucking that they discontinued by agreement back there. He is talking about some restricted trucking job that had been permitted on a certain basis.

Trial Examiner Norwood: Are you referring to trucking as of the present day, in the last two years?

The Witness: Yes, sir.

Mr. MacIntyre: Sure. This man was not with the company back then.

Mr. Withrow: Your Honor, I am not going into the savings of trucking in 1931 and 1932 with this witness, because that company ceases to exist. What we are talking about now is another company; and Mr. MacIntyre, there are several issues on this subject of trucking—at least, from the proof that they have put in.

Now, I have asked Mr. MacIntyre to stipulate one of those little issues out of the case, because he comes back with a statement: "what is the importance of trucking". It seems to me we ought to get this issue out of the case, but there is plenty of evidence on this.

Mr. MacIntyre: There is evidence that the company agreed to discontinue trucking in 1931 and 1932. The fact that they are now doing it on a high cost basis does not meet the issue in the record.

2264 By Mr. Withrow:

Q. If you know, Mr. Warren, could you tell us how the cost per barrel for loading cement into trucks compares with the cost per barrel for loading cement on railroad cars, so far as your company is concerned?

A. In view of the relatively small number of trucks that we load, the actual cost of loading is not greatly different except that the use of trucks is an invitation to the customer to demand a type of service that is unusual. We are often called upon to load trucks after closing hours, extra time and overtime. That seems necessary in order to hold the trade on those conditions—under those conditions, even to the point that we have called packers and drivers out of bed at night to load trucks to make deliveries the next morning, which we have never done for carload customers.

Q. Now, do you allow this trucking of cement, or do you truck cement to all of the destinations where you sell?

A. No.

Q. Why don't you extend this service to all dealers?

32265 A. We do not have the request from other customers. I do not believe it is economical.

I want to make the point clear that we do it only at those points where competitors offer truck service and where customers will deal with us only on the basis that we deliver by trucks.

By Mr. Withrow:

Q. Well, there is some testimony in this case, Mr. Warren, about the existence of trucking in Western New York, sold in the Buffalo area.

Do you ship by truck to Buffalo?

A. No, we do not ship any by truck to Buffalo.

Q. Do you ship by carload?

A. Carloads.

Q. And do you find that your dealers in Buffalo request you to ship by truck, or do they request you to ship it by carload?

A. Well, those dealers understand that we don't deliver by truck there, and we have been able to hold

32266 a reasonable volume in that area by carload delivery.

32271 Mr. Withrow: I offer to prove at this time, Your Honor, through the witness on the stand, that in June, 1938, the Bessemer Limestone and Cement Company, an Ohio corporation, opened a warehouse in Cleveland; that this warehouse was opened as the result of a price change referred to in Respondents' Exhibit 2330-A to S,—rather, a change in service rendered by some of his competitors.

I offer to prove that in the fall of 1938 the Bessemer Company discontinued its warehouse, because its warehouse was placed there only to meet competition from some of the other cement manufacturers doing business in the Cleveland area; that they remained in the market because they had an investment in the Cleveland market and had to stay there; and that they experimented

32272 with the warehouse by the method of remaining in the market; that during that time they sold in Cleveland in less than truckload lots, and that they discontinued this practice at the time,—the warehouse,—when they found it unnecessary to give this special type of service.

Trial Examiner Norwood: Well, now, do you propose to show that when they sold in Cleveland in less than truckload lots, that they were not selling on the uniform delivered price there, that it was based on rail or switching charges?

Mr. Withrow: I propose to show—

I will further show, and offer to prove at this time, through this witness, that he was selling at the price which he found current in Cleveland at that time for delivery to Cleveland—

Trial Examiner Norwood: Yes.

Mr. Withrow: —and at the Cuyahoga County price which had no relation to rail or truck costs in any way, but what the market price at that point—

Trial Examiner Norwood (Interposing): I want to get this clear: All that is subsequent to the complaint, is it not?

Mr. Withrow: All of that, Your Honor, is with reference to the matter of trucking. It started before the complaint, continued subsequent to the complaint.

2273 Trial Examiner Norwood: Well, is it to explain any evidence, or exhibits, that have been received for the purpose of showing continuances of these activities?

Mr. Withrow: Your Honor; it is to explain the activity of the Bessemer Company in trucking in the territory, to-wit, Cuyahoga County, concerning which, incidentally, Counsel for the Commission has offered a number of documents and some oral testimony.

Now, the question of trucking in Cuyahoga County started long before 1938, but it has continued, and we are offering to show the manner in which it continued, and the independent action of this Respondent, the Bessemer Limestone and Cement Company.

Trial Examiner Norwood: What do you wish to say, Mr. MacIntyre?

Mr. MacIntyre: This is a new incident, the opening of silos and warehouses in 1938 by this company, and other companies. It is not a continuing action.

The papers, themselves, show that they were opened on May 26, and subsequent thereto, in 1938, and later that year were closed.

It is a new thing that was later wiped out in that year.

Trial Examiner Norwood: Well, I shall reject the testimony.

32280 By Mr. Withrow:

Q. Now, Mr. Warren, since you have come with the Bessemer Company has there ever been an attempted price increase in your territory which was not followed by all the cement manufacturers in that area?

A. Yes, there has.

Q. Would you describe briefly what happened on one of those occasions?

A. We received a call from our Cleveland man advising that he had learned that Medusa had issued quotations which reflected a price which quoted a price of
32281 $1.94 in paper delivered in truckload lots, when the prevailing price had been $1.60 in paper, both prices subject to a discount of 10 cents for cash, and those prices went generally to the dealers in the Cleveland Metropolitan area.

We immediately decided to meet that quotation, and so instructed him, and issued our quotations to meet it. That carried with it, I think, a five-day notice before the effective date.

32283. Q. Do you ever have a request by customers to come to the mill and take delivery in their own trucks?

A. Once in a very long time.

Q. And, if you know, would you tell us under what circumstances these requests were made?

A. Almost always emergency conditions, where a customer needs cement of a special test, in small quantities, and in a hurry, when it may not be available in the dealer's warehouse.

Q. Under those circumstances do you sometimes allow them to come to the mill with their trucks and get
32284 this special cement in small quantities?

A. I think we have always accommodated the customer when he had an emergency condition to meet.

Q. Now, since you have been connected with the Bessemer Company, would you tell us whether you have ever considered the question as to whether you should, or whether it was desirable for the Bessemer Company to allow customers to come to the mill and take delivery by truck?

A. Yes, we have given consideration to that.

Q. And what conclusion did you reach?

A. We concluded not to do it.

Q. And would you tell us what the basis was for concluding that?

A. The conclusion was based to quite some extent on our experience in operating that Cleveland warehouse,
32285 which presented a condition similar to letting people come to your mill. They come to our warehouse, to our property, with their trucks to load, and, to put it in a very few words, that just puts you right in a retail business, dealing in very small quantities, many bills—many invoices to make, and method of securing the business entirely contrary to our idea of the proper way to operate our business.

People likely to come at all hours forces you to have crews handy, or face customer ill will. And if that were multiplied by the great number of customers that might be involved if you set out on an f.o.b. mill basis, it would probably introduce congestion at the mill.

Trial Examiner Norwood: I think you had better confine your answer to facts.

The Witness: Your Honor, that is a condition that I observed at one of our neighbor's plants, when they sold pulverized limestone to trucks that came.

Trial Examiner Norwood: Yes.

The Witness: And those men go through a terrific headache.

32286 By Mr. Withrow:

Q. Mr. Warren, have you ever had occasion to discuss with dealers or contractors the question of their attitude toward trucking cement?

Mr. MacIntyre: I object. It is irrelevant and immaterial.

Trial Examiner Norwood: Objection sustained.

Mr. Withrow: Your Honor, I do not see how anything can be more relevant and material to the issues in this case than a customer's attitude towards one of the matters concerning which we were charged.

Trial Examiner Norwood: I have already ruled on it. You can save the argument for the Commission.

Go ahead.

32287 Mr. Withrow: Your Honor, I offer to prove through this witness that the dealer-customers of the Bessemer Portland Cement Company have from time to time discussed the question of their attitude towards trucking with the employees and officers of the Bessemer

Company, and that such dealer customers have expressed a dislike to the problem, the question of trucking, and are opposed to it, except under certain emergency situations, on the grounds already stated by the witness; and, on the further grounds that the dealers are afraid that an increase of the existence of trucking would tend to eliminate the existence of the cement dealers.

Trial Examiner Norwood: Yes.

Now, the record will show that you have covered that, and whether deliberately or not that you are wast-
32288 ing time on this matter, and if it continues I want to advise the Counsel that I am going to make it a basis of a memorandum to the Commission,—these things where you have your exception, and there is no use going back into it, and the time has come when we must stop this waste of time.

Now, proceed with your examination.

By Mr. Withrow:

Q. Mr. Warren, the complaint in this case charges that your company, the Bessemer Limestone and Cement Company, an Ohio corporation, has made a concerted effort to charge 15 cents a barrel more for delivery by truck.

Would you tell use whether or not your company has ever charged 15 cents per barrel more for delivery by truck?

A. We have not.

Q. Has your company any agreement or understanding with any competitor to forbid the loading of customers' trucks?

A. We have not.

Q. Now, have you ever had any conferences with railroad officials with reference to the discontinuance of trucking?

A. We have not.

Q. And if you decided as a matter of company policy that you wanted to truck cement, or allow dealers to take delivery at the mill in their trucks, would you be free to do so?

A. We would.

Q. Have you ever considered whether or not you
32289 could drive your competitors out of Youngstown?

A. I have.

Q. Have you ever attempted to do it?

A. I have not.

Q. And why haven't you?

A. I am very certain that if it were possible to accomplish that at all, it could only be at a cost that would be destructive to us. I assume you refer to moving the price down where it is impossible for them to stay in. Now, knowing our own reaction to, and what we have done in the face of extremely low markets, extremely low prices in markets where we were interested, I assume that competitors would stay in there at a very low price, and I believe there is a degree of healthfulness to our business in having competitors in that market.

Q. Just on that subject, Mr. Warren: On record page 32088, in the next to the last answer on that page, the question was as follows,—and I do not think that the Reporter got the answer right. If you would like to make any comment on it, why, go ahead.

The question was:

"Q. Would you tell us approximately what the 32290 range is between your maximum mill net and your minimum mill net. Take any year you want to, since you have been connected with the Bessemer Company."

Now, the answer, as reported by the Reporter is:

"A. Last year our maximum mill net,—this may not be the top,—but around $1.70 would be the highest that I would recall, and we had some business that would be less a dime, would be $1.60, and other business would be around $1.70 less a dime, that would be—"

Was that the answer you gave?

A. "The high of $1.70, less a dime; the extreme low, $1.07, less a dime.

Q. And where was this $1.07? What destination, do you know?

A. That was at—the very low price that prevailed in Cleveland for quite some time. If I could, I would like to add that, generally speaking, our bottom range was around $1.30, less a dime.

Q. That is, $1.30 as a general minimum?

A. Yes, in very few instances lower than that, except this one, and very little volume lower than that.

Q. Now, as a part of the Government's case, Mr. Warren, there was some effort to show that cement companies should give a quantity discount. Do you grant quantity discounts?

A. We do not.

32292 The witness identified Resp. Ex. 2333A through M as the bid file on bids made to the Commonwealth of Pennsylvania. The handwriting appearing on Resp. Ex. 2333 A is Paul Sweeney's, who was one of Bessemer's Pennsylvania representatives at that time. Mr. Sweeney's handwriting appears on Resp. Ex. 2333 C. Resp. Ex. 2333 E and F is a copy of the bid which Bessemer sub-

32293 mitted to the Commonwealth of Pennsylvania. Resp. Ex. 2333 H, J, and L are the work sheets prepared in Bessemer's office in connection with that bid.

Mr. Withrow: Your Honor, I offer in evidence at this time Respondents' Exhibits 2333-A, B, C, D, E, F, H, G, and L,—the numbers omitted are backs of forms which are unimportant (handing documents to Mr. MacIntyre).

Examination on Voir Dire by Mr. MacIntyre.

Q. Mr. Warren, referring to Respondents' Exhibit 2333-H, for identification, will you tell me in whose handwriting that set of notes appear?

A. The larger figures and larger writing are George Brundage, our office manager.

Q. Here (indicating)?

A. This lad here is one of his clerks, Paul Boffman.

Q. Can you tell me what those notes mean?

32294 A. They are the figures that show the price, and our mill nets.

Q. And show basing points, freights and basing points to destination; is that what they show?

A. That's part of it, there is the basing points—it don't show basing points—it shows bases.

Q. Basing-point prices?

A. Well, Mr. MacIntyre, it doesn't show any basing-point prices; they show bases.

32295 Q. What bases?

A. Here is one, $1.65, and one dollar and—

Q. What basis is that?

A. It looks like Lehigh Valley; this is Lehigh Valley (indicating on exhibit).

Q. What was the purpose of the notes, as you see them?

A. These are the price—

Q. Well, what do you understand was the reason for including the letters "LV-1.65" on there, Mr. Warren?

A. That's a memo of the Lehigh Valley base, 1.65.

Q. Why was that? What is your understanding as to why it was included in the figures appearing on Respondents' Exhibit, for identification, 2333-H?

A. It is a record of the basis for this estimate of price.

Q. In other words, the figuring of some price from a basing point, and then figuring back to mill nets on the basis of that figure; is that it? Is that your understanding?

Mr. Withrow: Your Honor, I object to that. It is obviously not proper voir dire examination.

Trial Examiner Norwood: The objection is overruled.

32296 A. Well, I will explain it, Mr. MacIntyre. Look here (indicating): "Lehigh Valley 1.65, rate 40."

Q. But Lehigh Valley to where?

A. Parsons, Pa., plus 15 cents for paper package, 2.20 is the price in paper, subject to a 10-cent discount.

Q. At Parsons?

A. At Parsons.

Now, our freight from Walford to Parsons is 68, and take off the 15 leaves 1.37 mill net, less a dime.

Q. So all of the figures that appear on that sheet, as well as on Respondents' Exhibits 2333-J, 2333-L, were arrived at in the same manner for the various destinations, and for the purpose of figuring the bids which are shown on Respondents' Exhibits 2333-E and F; is that correct?

A. For the purpose of estimating the prices that we showed on those bids.

Q. And for figuring out the bids that are shown on Respondents' Exhibits 2333-E and F?

A. After we got our unit price we multiplied by total number of barrels to get total price.

Q. I am talking about unit prices now. That is the way you showed—that is the way you figured them out, such as is shown by Respondents' Exhibits 2333-H, J, and L; is that correct?

A. (Witness examines papers.) Well, will you say what you said again, Mr. MacIntyre?

32297 A. Mr. MacIntyre, these are our estimates.

Q. Showing how you figured prices that were used in the bids; is that correct?

A. These are the records on the calculations that we went through to estimate our price (indicating).

Q. That is, in figuring out price?

A. I said to estimate it, Mr. MacIntyre.

Q. Well, I am trying to find out what you mean by the word "estimate," now.

Mr. Withrow: Ask him what he meant by the word "estimate."

Mr. MacIntyre: All right.

Mr. Withrow: Don't try to put words in his mouth.

Trial Examiner Norwood: That is, figure out an estimate?

The Witness: Yes, we do.

Trial Examiner Norwood: And those are the figures, are they (referring to exhibit)?

The Witness: These are the figures that we used to estimate our price.

Trial Examiner Norwood: All right.

32298 By Mr. MacIntyre:

Q. Are those the figures that were placed on the bids, Respondents' Exhibits 2333-E and F?

A. They are the same.

Mr. MacIntyre: Your Honor please, we object to the offer as showing no more than has been shown many times over, that the basing-point method and basing-point system of figuring prices that were used in quoting the prices that were submitted by this company, under sealed bid to the State of Pennsylvania, and other such governmental bodies, is the same as those used by the competitors. That is, the using of that method, they show nothing else.

Unless there is some offer of proof that it is offered to show a lack of identity of prices, we state that as an objection.

Trial Examiner Norwood: Do they show anything different from what Counsel has stated?

32299 Mr. Withrow: Well, I do not think they show what Counsel for the Commission stated, I am sure.

Trial Examiner Norwood: Well, what do they show?

Mr. Withrow: Well, they show this company's procedure, and how it made up this bid, and not characteristic on that—

Trial Examiner Norwood: How it made up this bid in accordance with the formula here which all of these Respondents have testified they employed,—is that what it shows?

Mr. Withrow: Not in accordance with anything, Your Honor; but only in the manner in which this company—

Trial Examiner Norwood: Yes.

Mr. Withrow: —the Bessemer Limestone and Cement Company made up that bid. That is all it shows.

Trial Examiner Norwood: It shows that they did or did not employ the formula,—which?

Mr. Withrow: There is no testimony about the existence of a formula, as far as this company is concerned, Your Honor.

Trial Examiner Norwood: I am speaking about what you are offering this to show.

Mr. Withrow: I am offering this to show how it bid on this specific letting.

Trial Examiner Norwood: And you are not will-
32300 ing to inform me as to whether or not it shows they employed a formula, or whether or not it shows that they did not employ a formula?

Mr. Withrow: Why, Your Honor, that is for the witness to state whether they employed a formula or not.

Trial Examiner Norwood: It is for you to state when I ask you.

Mr. Withrow: It is my contention that they do not use a formula, and never have used a formula. So I cannot agree that these papers show that they used a formula.

Mr. Wooden: The witness' testimony, Your Honor, is an answer to that. He testified just a moment ago that these papers show the use of the Lehigh Valley base, for instance, plus freight.

Mr. Withrow: Your Honor, that is just what I said—it is up to the witness.

Trial Examiner Norwood: The list of bids that you are offering there, one of them constitutes the bid that you made there.

Is this a bid about which the Commission has put in testimony?

Mr. Withrow: Yes, Your Honor.

Trial Examiner Norwood: One of them is a bid that is already in evidence?

32301 Mr. Withrow: Well, of course, the bid is not in evidence, Your Honor; just the tabulation.

Trial Examiner Norwood: I mean the tabulation.

Mr. Withrow: Yes.

Trial Examiner Norwood: Well, I think that that is clear.

Let me examine those.

(Counsel hands exhibits to Trial Examiner.)

Mr. Wooden: Your Honor, it only confirms what may have been put in evidence by the Commission. It does not at all dispute that.

32302 The witness identified Resp. Ex. 2334-A through E as an invitation and copy of bid which Bessemer made in answer to the invitation from the Soil Conservation Service. Resp. Ex. 2334 is in the handwriting of George Brundage. This is a record of the way in which Bessemer estimated its price at Fresno, Ohio. That

32303 paper relates to the same bid. He identified Resp. Ex. 2334-G to J as papers received or sent by Bessemer relating to that same inquiry from the Soil Conversation Service; Resp. Ex. 2335-B and C as a copy of an invitation to bid which Bessemer received from the Department of Justice. The typewritten material filled in on this is a copy of Bessemer's bid in answer to that inquiry. He identified Resp. Ex. 2335-D as a portion of that bid.

32304 The handwriting on Resp. Ex. 2335-E is that of George Brundage. This summarizes the manner in which Brundage estimated the price bid to Chillicothe, Ohio and it was prepared at the time of the bid. He identified Resp. Ex. 2335-A as a copy of a letter prepared in Bessemer's office in the regular course of business.

32318 (RESP. EXS. 2333-A, B, C, D, E, F, G, H, J, L, 2334-A, C, D, E, were offered and received in evidence.)

(RESP. EX. 2335-B, C, and D was offered and received in evidence.)

32319 By Mr. Withrow:

32320 Q. Mr. Warren, would you just outline for us your reasons for not granting quantity discounts to purchasers?

A. I have studied that, directing my efforts to find some basis on which we could found a plan for quantity discounts, and there is nothing in our experience that I can point to that justifies making a quantity discount.

For example, the one that comes to me most often is—we have a mill to run; that is our job, to run it as much as we can, and a fellow comes along with a request to bid on a big chunk of business. Maybe it would be five or even ten percent of a year's capacity. Now, we take that and add it to the big bulk of volume that comes to us regularly from our regular trade to build a total volume. And, I am un-

able to determine whether the gain that we make results from this five or ten percent addition, which represents a single buyer, or this big normal basic bulk which comes from many, many consumers.

I am a little inclined to think that if there is a preference, the small buyer, who has stayed with me over a long period of years, should be entitled to fully as much consideration, even though his total bulk might not be as big as the one big one. The great number of those are entitled to real consideration. And I am unable to find any basis on which to differentiate.

32321 Q. Now, Mr. Warren, there was some testimony given by Mr. Cosgrove, an official of Pennsylvania, where he testified that salesmen of some of the companies in bidding to the State of Pennsylvania told him that they would be penalized if they quoted a lower price on a letting of the State of Pennsylvania.

Are you a party to any agreement to penalize companies that bid lower than the price which you bid?

A. No.

32322 Q. Do you know of any such agreement or understanding?

A. No.

Q. Now, has your company ever sold to the Federal Government, or to any State Government, at a price other than the price you were quoting your commercial customers at the same point, and at the same time, since you have been with the Bessemer Company?

A. No.

Q. Now, in connection with this Tygart River Dam, were there any added expenses in connection with that job which would not exist on a job involving standard Portland cement?

A. There were.

32323 Q. Would you tell us what they were, briefly?

A. Special raw materials, that would be bought for the purpose of adding iron, getting iron; different burning process; the necessity of clearing out storage—

Trial Examiner Norwood (Interposing): You do not need to go into detail. Just tell us whether or not an extra or different quantity is required, and whether or not that was more expensive, or just what the situation was.

The Witness: As I understood his question, Your Honor, it was whether we had extra things to do.

Trial Examiner Norwood: Well, answer that "yes" or "no."

The Witness: I did; I told him we had extra things to do.

By Mr. Withrow:

Q. Did these extra things add to your cost in connection with that job?

Mr. Wooden: Your Honor, I object to that, and to the whole line of inquiry, because it goes to the question of the reasonableness of the price quoted on it, on that Tygart River Dam, a matter which has not been put in issue at all.

Trial Examiner Norwood: Well—

32324 Mr. Wooden: And the witness has just got through testifying that his price on Government business was on the same basis as on commercial business.

Trial Examiner Norwood: Yes.

Mr. Wooden: And that is the way that price was—

Trial Examiner Norwood: And, as I understood it, he is going to that same point by showing that here was a large order which cost him more; is that right?

Mr. Withrow: Yes, Your Honor, and it is one of the jobs on which the Commission put in evidence, and it is specifically one of those jobs, and, as I remember the complaint, there is an allegation in the complaint to the effect that we, as the result of these various—that the various Respondents, as the result of their method of doing business, have taken more than their share of the public funds, whatever that may mean.

We certainly are entitled to show that the Federal Government got a good bargain on it, and that they were not entitled to a better price; it cost more money to manufacture their product—more money to service and store their product than for ordinary commercial customers.

Trial Examiner Norwood: That opens up costs, does it not?

Mr. Withrow: I do not think it does, Your Honor.

This is all relative, and I do not think that we

32325 need to go into all of the figures of cost, however—

Mr. Wooden: I don't think it opens it up. We put in the Tygart River Dam bids showing the identical bids. The witness has already testified that they made the same price on that bid that they did on commercial business. We certainly raised no issue as to the reasonableness of that price or the cost of handling that business.

Mr. Leisure: Your Honor pleases, if identical price were the only thing involved in the complaint, I think that Mr. Wooden's objection would be very well, but unless the Commission is willing to stipulate, and we proffer such stipulation now, if they feel that this is not material, then there is no issue as to the reasonableness of the price that we
32326 quoted to Tygart Dam, and we will not press this point.

Mr. Wooden: The only point, Your Honor, is that we contend Tygart River bidding was not competitive bidding because it used the basing-point system on arrival at an identical delivered price. We do not take any position as to the reasonableness of that price, other than it is a non-competitive price.

Trial Examiner Norwood: Well, it seems to me, under the pleadings, the reasonableness of price is necessarily involved in this statement there that this industry is taking more of the public income.

Trial Examiner Norwood: And thereby delaying the depression, and all that.

Mr. MacIntyre: Your Honor please, that is alleged as the effect. If you have a non-competitive price, of course, one of the effects naturally flowing from that is one of unreasonableness, such as anyone could conclude; but it is not an allegation as to the existence of a combination in bringing about the non-competitive price, itself, and, as Mr. Wooden has just admitted, the bid, itself, and the abstract of bids, were put in for the purpose of showing the non-competitive character of the prices quoted. Beyond that, he did not attempt to show anything.

32328 Trial Examiner Norwood: Well, reasonable restraint does not necessarily flow from reasonableness of price, and that is one of the things in the decision regarding anti-trust cases.

Trial Examiner Norwood: So, if you agree to eliminate reasonableness of price from the case, it would have no such effect, as you pointed out there.

Trial Examiner Norwood: Is there any evidence to show that the price is—do you contend that there is evidence which shows that the prices generally were unreasonable?

Mr. Wooden: We contend, Your Honor, that a non-competitive price is inherently unreasonable.

Trial Examiner Norwood: Yes.

Mr. Wooden: Now, if they want to admit the price is

non-competitive, and say that it is reasonable, nevertheless, why, I can understand what they are about; but they are trying to disprove the non-competitive character of
32329 the price by showing that it is reasonable, and it has no application to that at all. It has no logical tendency to prove or disprove it; it is irrelevant, for that purpose, and I object.

Trial Examiner Norwood: He is showing here a reduction of profits.

Mr. Wooden: Yes; but as to the reasonableness of the price, it is practically the same question.

Trial Examiner Norwood: I am going to say, like I said heretofore, that if in the confusion of the issues at the start of this case we have received any evidence
32330 going to the reasonableness of price, I will entertain a motion to strike it.

I am going to sustain the objection here and strike this answer.

Trial Examiner Norwood: And not permit any further testimony here going to this reasonableness of price.

Now, that will give you an exception.

Mr. Withrow: I offer to prove through this witness that it cost the Bessemer Portland Cement Company more to manufacture the special cement for Tygart River Reservoir Dam than to manufacture an equal amount of standard Portland cement; that the servicing of that job entailed additional expense in the form of tying up large storage equipment as necessary for testing the cement and keeping a large supply of tested cement on hand which represented invested capital, together with additional expenses resulting from the fact that the equipment in the mill and
32331 the storage space had to be especially cleaned before the tested cement was made in order for the tested cement to meet the specifications; and, further, that all of these matters enhanced the cost to the Bessemer Limestone and Cement Company in connection with its supplying cement under contract received for Tygart River Reservoir Dam.

Trial Examiner Norwood: Counsel has his exception.

Mr. Withrow: One of the positions taken by Counsel for the Commission, as a part of their case, was the fact that the United States Government was entitled to special consideration because it always paid "cash on the barrel head," as Mr. Wooden repeatedly used the phrase.

Trial Examiner Norwood: Yes.

32332 Mr. Withrow: And I propose to show that the facts are considerably different from that.

Trial Examiner Norwood: Well, we have gone into that several times.

Mr. Withrow: Well, if Counsel for the Commission is now willing to stipulate that the United States Government does not pay cash on the barrel head, and, furthermore, often pays late and insists on taking the cash discount, I think that we could rule that matter right out of the case, and I offer to so stipulate at the present time.

Mr. Wooden: Your Honor, I do not recall ever making the statements to which Mr. Withrow referred. I know very well that the Government did not pay cash on the barrel head, and I never used the expression, as far as I can recall.

Trial Examiner Norwood: I think we might as well drop the subject in view of Counsel's admission there.

Mr. Withrow: I take it, then, Mr. Wooden has agreed to stipulate.

Mr. Mac Intyre: Your Honor, we agree to this, that the Government lives up to its contracts, and does not pay cash on the barrel head, but does live up to the contract in accordance with the terms of its contracts.

32333 By Mr. Withrow:

Q. Now, before the adjournment or the recess over the week, I believe you testified, Mr. Warren, that your company had usually followed prices quoted by its competitors.

32334 Would you tell us, briefly, what the source of your information is as to prices quoted by your competitors?

32335 A. Our customers.

By Mr. Withrow:

Q. And would you tell us briefly whether you collect that information from customers at every point where you sell?

A. No, I do not know that we do from every point. We get a representative number of them. We get it from most of the people that we sell.

Q. Would you just tell us briefly, then, how you arrive

at prices at points where you have not picked up the specific information in the field?

A. I will make that very short.

When we find enough quotations or prices of competitors to give us an indication of what their price level is generally, we then make assumptions about that and issue our quotations, or undertake to sell on that same general level.

Q. When you do that do you have any assurance that your price at this point will be the same as the price being quoted by any given competitor of yours?

32336 A. No.

Q. Has there ever been an instance where you quoted on this basis and you found that your price was higher than the prices quoted by some of your competitors?

A. Yes, there have been.

Q. Now, Mr. Warren, would you tell us, if you can recall, what the first price change was of any extent that you encountered when you became connected with the Bessemer Company?

A. The first general change, as I recall, was—effective prices in West Virginia and the southern portion of Ohio.

Trial Examiner Norwood: What time was that? What date was that?

The Witness: That was early in 1937.

The witness identified Resp. Ex. 2336 as an inter-office communication prepared in the regular course of business. The handwriting on it "F. B. W." is that of Frank Peck, at that time assistant sales manager, and it is marked for the attention of the witness. It came to the witness' attention in the regular course of business and that it

32337 refers to the price increase or price change that he has just been talking about.

(RESP. EX. 2336, was offered and received in evidence.)

By Mr. Withrow:

Q. Now, Mr. Warren, were you informed—how were you first—when did this change first come to your attention? Under what circumstances, if you know?

A. I was in bed. I was called to the telephone, in Harrisburg, at the time. Mr. Brundage was on the telephone, and told me that Mr. Harbold had telephoned him from West Virginia that he had picked up quotations from Alpha in-

creasing the price at Clarksburg, Morgantown, I think, Fairmount—

Q. Now, there is some—

32338 Q. Now, there is some testimony of certain inferences which were tried to be drawn to the effect that the company initiating changes in base informed other companies in advance of the change.

Did the Alpha Company send any communication to you announcing this change in base—change in destination prices?

A. They did not.

Q. There was some evidence offered from which Counsel for the Commission attempted to draw an inference that under certain circumstances a long list of so-called base prices was circulated.

Did someone send you a list of base prices showing any change at this time?

A. They did not.

Q. Mr. Warren, was there any change in prices in northern Ohio at this same time.

A. Not at that time.

32339 The witness identified Resp. Ex. 2337 as an interoffice memorandum prepared in Bessemer's office; Resp. Ex. 2337-B through G as copies of quotations which Bessemer secured from dealers in the regular course of business.

32342 (RESP. EX. 2337-A to 2337-G, was offered and received in evidence.)

32350 By Mr. Withrow:

Q. Mr. Warren, I show you Respondents' Exhibit 2337-A to G, and also 2336, and ask you if these two exhibits are the typical manner in which you receive and handle information concerning competitors' destination prices (showing documents to witness)?

A. They are.

Q. Do you receive from competitors direct statements as to what their destination prices are?

A. No.

32353 Q. Mr. Warren, would you tell us how you handle invoices to customers in the event of a decline in price, on shipments that move just before the decline?

A. In case of a decline that is effective today, you see,

we go back over the last five days' shipments, and adjust our charges, and those shipments, to the level established by the new low prices.

Q. Has that been your procedure ever since you have been with the Bessemer Company?

A. It has been.

Q. Mr. Warren, are your salesmen instructed to pick up information concerning delivered prices quoted by your competitors?

A. They are.

Q. And after they have secured these quotations, what do they do with them?

A. They immediately advise us or mail in quotations.

Q. Do you insist on obtaining a written quotation in order to verify a change in delivered price?

32354 A. We try to get them if we can. I don't think that we have always done that. We like to collect as much as we can, and as accurate information as we can get.

Q. Now, do you make a practice of following opening of sealed bids taken in your territory?

A. We do.

Q. How do you do that? How do you get the information?

A. We have report services. They report those things to us. We also have our salesmen attend openings, report in that way. We occasionally write to the body that we bid to, and ask them for a report of the bids.

Q. Did you ever, in any of these instances, find any new—any different delivered prices than you thought were in effect as the result of checking these openings of bids?

A. Oh, yes.

Q. Now, do you receive letters from your competitors informing you of changes in their delivered prices, or their so-called price bases?

A. I never have.

Q. Do you issue quotations to the trade in the event of a change in price—a change in your price?

A. Generally we do; we haven't always.

Q. Now, after you have issued those quotations, do you check with your dealers at all the destinations to see if your prices are as low as the prices of your competitors?

32355 A. No.

32356 Q. When you quote a price—when you issue these quotations that you say you do not check, do you have any assurance that the price that you quote will be the lowest price quoted by any of your competitors at any given destination?

A. No.

Q. Now, in issuing quotations to the trade, what is your practice, with reference to the showing the date of the issuance on the quotation? Is the date on there the date you made up the quotation, or the date you mail it, or the date you think the dealer is going to receive it, or is the date the same as that on the quotations of some other company which initiated the change in price? Just what is the procedure?

A. Well, Mr. Withrow, I do not believe we have a definite practice on that. We have, at times, dated those in a way to make an effective date to meet the effective date that some one else had established. We have at 32357 other times dated them in a way to delay the effective date for our own customers. I would say that we have done that each time on the basis of what seemed to us to be the reasonable and common sense thing to do at the time we were issuing the quotations.

Q. Now, in the event of a decline in price, would you tell us whether you meet the lower quotations by one of your competitors, verbally, before you issue quotations?

A. Yes, I think—I know we have many times.

Q. Now, you testified a few moments ago that in the event of a decline in price you reduce the invoices on some of the cement which you shipped just before the decline. Would you tell us your reasons for doing that?

A. Our customary—it is to meet this sort of a condition: We don't want a customer who has thought that there may be a decline in price coming to hesitate to buy, and if he has we want him to feel some assurance that he is not taking a chance in placing his business with us. So we follow the practice—if a customer has cement that we have shipped within five days prior to the date of a decline, we let his price be equivalent to the lowest that is in the market at that time.

Q. So that your customers are aware of this practice?

A. Oh, yes, our customers are aware of the practice.

Q. Do any of them ever call up and ask to be credited on these back amounts when they learn of a decline in price?

A. Yes; we have had that happen. We have had
32358 letters come in asking if we would do that.

Q. Would you tell us whether or not that was before you had announced your change—your reduction in price?

A. I wouldn't recall whether it would be before or whether it would be after, Mr. Withrow.

Q. Now, the other day, Mr. Warren, you testified about finding a reduction in the Cleveland market from $1.65 to $1.60 a barrel, and you did not find any quotations to that effect. Did you receive any advance notice from any of your competitors as to this reduction?

A. No.

Q. Mr. Warren, I believe you testified that you secured freight rate books from The Cement Institute. Is that correct?

A. That is correct.

Q. Now, has the Bessemer Company always used Cement Institute freight rate books since you came with the Bessemer Company?

A. We have always had them since I came. At the time I came the company was using their own freight rate books made up in the office.

The witness identified Resp. Ex. 2339 A, B and C,
32359 as sheets from the Bessemer rate books which was in use at the time he came with the company.

Mr. Withrow: Your Honor, I offer in evidence at this time Respondents' Exhibit 2339-A to C.

I have just removed them from the book. We can save the record, instead of offering the whole book (handing the papers to Commission's Counsel).

32361 (RESP. EX. 2339-A to 2339-C was offered and received in evidence.)

Direct Examination by Mr. Withrow (Continued).

Q. Showing you again 2339-C, would "PV" be Painesville?

A. It could be.

Q. And "BR," Brixment?

A. Quite likely.

Q. The information with reference to Brixment applies—if that is Brixment—would apply to mortar?

A. That is correct.

Q. Do you use any of your own rate books at all at the present time? I mean, have you kept them up to date?

A. No. We have discontinued keeping them up to date. We still refer to them occasionally for—

Q. Now, who was it in your company decided to
32362 abandon the preparation and use of your own rate book?

A. I did.

Q. And what were your reasons for discontinuing the publication of your own rate book?

A. The difficulty and great amount of time involved in making these books.

Q. Do you know how the cost of preparing your own rate books compared with the cost in purchasing rate books from The Cement Institute?

32364 A. Mr. Withrow, I do not recall either of those costs, but I recall studying the question carefully and finding that it would be a saving in time; it would save us a lot of time that we could use; it would be a very economical thing for us to discontinue these rate books of our own and using the ones that come from the Institute.

By Mr. Withrow:

Q. Well, there is some testimony in the record to the effect that the Bessemer Company used to have a full-time traffic man. Do you have a full-time traffic man at the present time?

A. No.

The witness identified Resp. Ex. 2340 A and B as an inter-office memorandum prepared in Bessemer's office in the regular course of business which came to his at-
32365 tention.

32367 (RESP. EX. 2340-A and 2340-B was offered and received in evidence.)

By Mr. Withrow:

Q. Mr. Warren, in connection with this decision of yours to change from your own rate book to the Institute's, was there a change in the freight rates about that time?

A. Yes, there was a general change.

Q. And this necessitated the re-issuance of a freight rate book by the Bessemer Company?

A. If we would have continued with our own
32368 books, it would have been a tremendous job.

Q. But at the time did you make any study as to

approximately how much it would cost you to re-issue this rate book?

A. I did it more in terms of time than in terms of cost.

Q. Well, would it have entailed any additional help that you did not have?

A. We would have had to have either more people or else utterly neglect our routine work. We would have had to have more people. There would be no question about that.

Q. Now, when you issued your own rate books, were these rate books kept up to date whenever there were changes?

A. Oh, yes, yes.

Q. And would you tell us in what manner that was done?

A. Wherever changes were made we made new sheets.

Q. So on Respondents' Exhibit 2339-C, where it says "Third Correction," it is the third correction, page 1?

A. That is correct.

32369 Q. Now, Mr. Warren, where does your company get the routing information for shipments from your mill, if you know?

32371 The Witness: The majority of it is in the mind of the man who has to do with routing. In the event of any doubt, he calls the railroad agents who are to handle the shipments. The routing information has to do with train schedules, that is the important thing, and I have checked that pretty carefully, our men know those train schedules.

Trial Examiner Norwood: Yes.

The Witness: They will give them to you by train numbers for most of the important movements of freight that we have, and I hear them, occasionally, talking to a freight man, asking him if a certain train is still on, or if it has been taken off.

32373 Washington, D. C.,
Wednesday, February 14, 1940.

32377 F. B. WARREN thereupon resumed the stand and testified further as follows:

Direct Examination by Mr. Withrow (Continued).

Q. Mr. Warren, you testified the other day that you believed you secured all the business within the town of Walford.

Would you tell us whether you secure all the business in the towns immediately adjacent to your mill, small towns immediately adjacent to your mill?

A. I believe we do, having in mind that there are
32378 two other mills very close. New Castle is only a few miles away. Of course, in New Castle we do not get all the business; nearly all of it.

By Mr. Withrow:

Q. Do you attempt, or do you make any special effort to sell your cement near your mill, as opposed to selling it at distant points?

A. Oh, yes, we do.

Q. Did you know, or would you tell us, if you know, approximately what the freight rate is from your mill at Walford to Youngstown, Ohio?

32379 The Witness: Twenty-nine cents a barrel.

By Mr. Withrow:

Q. Now, have you ever made a study of the average freight cost on shipments made by the Bessemer Company?

A. I have.

The witness identified Resp. Ex. 2341 as a condensed statement showing Bessemer's barrels shipped by years and the total freight that was involved in those shipments reduced to average freight for the last half of 1935 up to and including the first three-quarters of 1939. The figures contained in the statement were taken from the rec-
32380 ords of Bessemer and it was prepared under the direction and supervision of the witness. He is familiar with the figures and vouches for their accuracy.

32392 (RESP. EX. 2341 was offered and received in evidence.)

32394 By Mr. Withrow:

Q. Mr. Warren, you testified the other day that you were, generally speaking, not a price leader but usually followed the prices—the lowest price quoted by some one of your competitors.

Would you explain, briefly, for the record, why you are not normally or usually a price leader?

A. We are located quite a little ways from two major consuming areas. There is not much consumption near us, and I have not felt that we were dominant enough in these big markets to take a position of leadership, and I will add to that that if there had ever been a time when I felt that we could afford a lower price I would have taken leadership in lowering that price, and I have not—when I wanted it higher—I have not felt that we were forceful enough factors in the market to dominate the moving up of the price.

Q. Now, when you issue quotations to your dealers do you keep an office copy of the last quotation you send each of your dealers?

A. Yes, we do.

Q. Now, would you tell us, if you know, whether
32395 in soliciting business your salesmen are often requested by a dealer what the price is at that dealer's warehouse?

A. Not often requested.

32396 Q. Now, would you tell me, if you know, whether or not you have any freight advantage in any considerable territory over the two mills which are located near your mill at Walford?

A. There are very few points that we do.

Q. And is there a lot of consumption at those points where you have an advantage?

A. No.

32397 Q. Mr. Warren, have you ever considered putting a so-called base at your mill at Walford?

A. I studied that question, yes.

Q. Well, would you just tell us briefly what your reasons were for not putting a base at your mill?

A. If we were to put a base there, that would reflect my idea of what it should be to bring the prices that we

would want. That would be one that would have to raise prices generally throughout the area that we sell. And it is so apparent that the dominant factors in those big markets near us want low prices, that I do not feel that we—can I change that a little—while I feel we might quote, I do not—I am not confident—that we could make our higher prices prevail in that area. There are mills between us and these bigger markets, mills that are closer to these markets.

32398 Q. And was the statement you just gave your reasons for being a so-called non-base mill?

A. They are part of them.

Q. Mr. Warren, have you ever reduced prices or experienced the reduction in prices in markets where you sell cement?

A. We have.

Q. Did you attempt to sell cement at this lower level?

32399 A. We did.

Q. At this lower price.

Now, what was your experience in those instances, as to whether your reduction in price stimulated the purchase of Bessemer cement by your customers?

A. It did not.

32400 Q. Now, in that instance, Mr. Warren, where you bid f.o.b. destination price, or the price which you said amounted to an f.o.b. mill price, has the United States Government informed you of the manner in which they desired delivery?

A. They have.

Q. And how was it, f.o.b. mill, or f.o.b. destination?

32401 A. F.o.b. destination.

Q. Has the performance bond been executed in that case?

A. It has.

Q. And was the performance bond executed on delivered price or mill price?

A. On delivered price.

32402 Q. Now, Mr. Warren, in 1937 on shipments did you pay the freight on all shipments, or did your customers pay some of the freight?

A. We did not pay the freight on all shipments.

Q. And when the customer paid some freight, for whose account did he pay it?

A. Paid it for our account.

The witness identified Resp. Ex. 2342-A to H as
32403 forms of Bessemer. Resp. Ex. 2342-A was in use when he joined Bessemer and is still used as is. Resp. Ex. 2342-C was in use when he joined Bessemer. Bessemer has made minor changes in it as to form but not as to conditions and reprinted it about a year and a half ago. Resp. Ex. 2342-E and G were in use when he joined Bessemer and it made minor changes as to form in both of them about a year and a half ago when the forms were reprinted.

32406 (RESP. EX. 2342-A to 2342-H was offered and received in evidence.)

By Mr. Withrow:

Q. Now, in transferring information from the invoices in sales of cement to your books, could you tell us, if you know, whether you show or charge against the customer the full amount of the invoice, or do you merely enter the delivered price and the freight?

32407 A. The cards—the card records in the accounting department show the balance due us after the customer has paid the railroad company the freight for our account. That is the customer card records. Now, our book records also contain the total charges.

Trial Examiner Norwood: Well, the card record shows what the freight ought to be, doesn't it?

The Witness: Whether that is transferred in duplicate or not, Your Honor, I am not sure. I think the invoice is the only place where the freight shows as such. It is there as a check record.

Trial Examiner Norwood: The card is something which you figure a subsequent price from, isn't it?

The Witness: No. These are big cards, Your Honor, that the bookkeeping department keeps.

Trial Examiner Norwood: All right.

By Mr. Withrow:

Q. Now, Mr. Warren, have there been any losses or damage in transit since you have been with the Bessemer Company?

A. There have been.

32408 Q. And who handles the claim in the event of such a loss?

A. We do.

Q. Mr. Warren, have you ever agreed with any of your competitors with reference to the subject of diversions of shipments in transit?

A. No.

Q. Have you ever agreed with any of your competitors on the question of standardization of Portland cement?

A. No.

32416 Q. Now, Mr. Warren, you testified that you sold some cement direct and some through your dealers. Would you just tell us briefly what the basis of your decision, or classification, is, as to when you sell direct and when through dealers?

A. The limitation is not exactly—but, generally speaking, we sell direct where dealers are not well equipped to serve, or where good dealers are not available, or for the type of work that they cannot serve well.

By Mr. Withrow:

Q. Now, Mr. Warren, are you familiar with the procedure used by your company in filling out bills of lading and tendering them to the railroad company?

A. I am.

32417 Q. Is the freight rate filled in in the bill of lading by someone connected with the Bessemer Company?

A. It is not.

Q. Well, would you just describe what the procedure is, briefly?

A. We make out the bill of lading, showing the consignee, the routing, we describe the shipment, show the weight, take it to the freight agent who fills in the rate. That is returned to us, and we check his rate in our office. That rate is again checked by the agent at destination, and is checked by the auditors of all railroad companies involved, and we also turn these records over to the Chamber of Commerce Traffic Department who check rates for accuracy against tariffs.

Q. And do they check on both incoming and outgoing freight?

A. They do.

32418 Q. Now, Mr. Warren, would you tell us, if you know, whether or not the Department of Justice, Bureau of Prisons, in its invitations which the Bessemer Company has received, normally requests bids on an f.o.b. destination basis?

A. F.o.b. destination.

32419 Q. Would you tell us how the National Park Service of the Department of the Interior had normally invited you to bid?

A. F.o.b. destination.

Q. And the State Procurement office of the State of Ohio?

A. F.o.b. destination.

Q. And the State Procurement office for the State of West Virginia?

A. F.o.b. destination.

Q. And the State Procurement office for the State of Pennsylvania?

A. F.o.b. destination.

Q. And the United States Engineers office at Pittsburgh?

A. F.o.b. destination.

Q. And the Department of Highways for the State of Ohio?

A. F.o.b. destination.

Q. And the Department of Public Works and the Division of Highways for the State of New York?

A. I am not sure about that one; we have had very little from them.

Q. And are these agencies which I have just listed the agencies from whom you usually receive invitations,

32420 governmental bodies?

A. Yes, they are.

The witness identified Resp. Ex. 2343 as a tabulation prepared in Bessemer's office from its records under his supervision. He vouches for the accuracy of the figures on it.

32430 Q. Mr. Warren, in this last column, where it says —well, in the second column where it says "Total Price," would you tell us, is that the total delivered price, or (showing to witness document marked for identification "Respondents' 2343")—

A. That's the total delivered price, and the only thing we have taken out of that is our estimate for containers.

Q. And the second column from the right "Price Less Containers" (indicating on document).

A. That's price less containers.

Q. So the last column, if I am correct, tell me—the last column is the average delivered price, less the containers?

A. That's what it is.

Q. And that irrespective of whether you pay the freight or whether the customer pays the freight for you,—it has nothing to do with the last column (referring to Respondents' Exhibit, for identification, 2343)?

A. Nothing at all.

32433 Q. Mr. Warren, I direct your attention to Respondents' Exhibit 2343 and ask you to tell us what is represented by this column headed "Total Price"?

A. That is the total sum of money that appears on our invoices to the customer covering delivered prices
32434 of Portland cement.

Q. And does that figure have any relation whatsoever to the question of whether or not you pay the freight or whether the dealer pays the freight for your account?

A. Oh, it has no bearing on it at all. That represents the agreed price.

Q. The contract price?

A. That is the contract price. That is the amount of our total obligation, or total contract.

Trial Examiner Norwood (addressing the witness): And that means that that is the price of the cement with the transportation included laid down at the particular poi-, is it?

The Witness: Exactly; with everything that is involved.

Trial Examiner Norwood: Yes.

Mr. Withrow: So it is the price laid down at the point of use.

Trial Examiner Norwood: Yes.

(Addressing the witness): Now, did you make that tabulation, Mr. Warren?

The Witness: I participated, supervised it, and verified it.

32436 (RESP. EX. 2343 was offered and received in evidence.)

32439 By Mr. Withrow:

Q. Has any information, Mr. Warren, come to your attention relating to errors in The Cement Institute freight rate books used by your company?

A. No.

32445 Trial Examiner Norwood: Please get to the point and tell me what there is in these papers that is not

contained in the admission he has just made there. That is, what relevant and material matter, what else do you want to show, then what is admitted there? Just point that out to us, and then we will know how to handle it.

Mr. Withrow: Your Honor, those papers correctly state the facts as to the two companies, as to who owned the assets and who did not. Now, just take one point in Mr. MacIntyre's admission, "certain assets," raising the inference that assets were not transferred, and there is a whole series of shadings which he has put in his admission, which do not represent the facts. Now, those papers represent the facts.

Trial Examiner Norwood: Where is the original?

Mr. MacIntyre: Well, if Your Honor please, you will note that some of the things that I did not read out of the stipulation are such as these: That this new corporation had nothing to do with the business of the other corporation after the reorganization, and so on, and even prior thereto, such statements as those. Well, the papers you have before you now could not be of any help on that. I left those out because they are self-serving; they
32446 are not factual; they are conclusions. I did admit the facts.

Mr. Withrow: This is what the testimony of the witnesses would have been, Your Honor, had they been called and asked to testify in behalf of the Bessemer Company. I think we passed the stage of stipulating. They are attempting to cut this down and put in a portion of the facts. I think that is a waste of time. I think the most expeditious way now is to receive the documents in evidence for what they show and what the facts really were, instead of trying to argue on shades of meaning here, and let the court decide on this.

Trial Examiner Norwood: Well, I will keep these over the recess. I will have to read these and see just what they are.

32447 Trial Examiner Norwood: The hearing will come to order.

I think that the admissions of the Commission's Counsel here, as contained in the record on page 32442 to 32444 cover all the relevant particulars which this proffer here of Respondents' 2344, 2345, 2346, and 2347 would cover, and that the proffer does contain considerable material that should not be admitted in this case.

So I am sustaining the objection to the proffer.

Cross-Examination by Mr. MacIntyre.

Q. Mr. Warren, I show you Respondents' Ex-
32448 hibit 2343, which was received in evidence here this morning, and now ask you to state whether or not the figures in the last column under the caption "Ave. Price Per Barrel" includes freight that was paid by your customers to the railroad companies; that is, amounts for freight so paid.

A. Mr. MacIntyre—

Q. Well, can't you answer that "yes" or "no" from your own knowledge?

A. No, because you assume a thing there that does not exist.

Q. What is it that I have assumed that does not exist, Mr. Warren?

A. You assume that this reflects something that it does not reflect at all.

Q. What is it that I have assumed that it reflects that it does not reflect, Mr. Warren?

A. Well, Mr. MacIntyre, this reflects our contracts, the total amount of our agreements, in dollars and cents with our customers for the periods that are covered. It represents the money due in exchange for what we do.

Q. Due whom? Due to whom?

A. Well, we do not do it to them; we do it for them.

Q. You say money due to someone. Now, due to whom?

A. Due to us as a part of our agreement.

Q. For what?

A. Well, if you will let me go ahead without in-
32449 terrupting me—

Q. I do not like any speeches. I would like answers to my questions.

So I am asking you again a very simple question, Mr. Warren. I am asking you whether or not the figures under the caption in the last column "Ave. Price Per Barrel," whether or not those figures include freight amounts that were paid by your customers to the railroad companies.

Now, if you know it seems you should be able to answer that either "yes" or "no."

Mr. Withrow: Which last pending five questions is the witness supposed to answer?

Mr. MacIntyre: I am asking the last question.

The Witness: Well, Mr. MacIntyre, you do not seem to

understand. This does not refer to freight amounts. Freight amounts are not involved in this compilation at all.

By Mr. MacIntyre:

Q. Well, I am asking you, though, whether or not those figures in that last column do, in fact, include freight that was paid by your customers to the railroad companies.

Can't you answer that question?

A. Well, I would love to if I could.

Q. Well—

A. But this doesn't—

32450 Q. —can't you state whether or not you can answer it? Can you answer it?

A. No, I can't answer it in the form you put it. The question is unanswerable in the form you put it.

Q. Don't you know whether it is included?

A. I know that these figures don't represent freight.

Q. I know, but does any part of the figures appearing in the last column include any freight?

A. (Witness makes no response.)

Q. Do they include any freight,—the figures in the last column?

A. Well, Mr. MacIntyre—freight isn't a part of this compilation at all; these are prices.

Q. I am asking you a question, now, Mr. Warren.

Mr. Withrow: Your Honor please, I submit that the witness is entitled to finish his answer. We probably could have been through by this time, but Mr. MacIntyre has repeatedly cut the witness off.

Trial Examiner Norwood: No, he has not; he has not. Go ahead.

By Mr. MacIntyre:

Q. Can't you answer that simple question as to whether or not freight is included among other things in the figures appearing in the last column on that paper?

A. Well, Mr. MacIntyre, freight was not any

32451 part of the consideration in this at all.

Q. You don't answer the question, Mr. Warren. I am asking you whether or not you know that freight was included as a part of the figures in the last column.

A. I am trying to tell you, Mr. MacIntyre, that freight is not the consideration in these figures.

Q. Well, that is not what I am asking you. I am asking you whether or not it constitutes any part.

A. It is not a consideration in the matter of these figures at all.

Trial Examiner Norwood: Freight is not figured in those at all?

The Witness: No—but, Your Honor, this does not represent freight.

Mr. MacIntyre: Well, if Your Honor please,—

Trial Examiner Norwood: What does it represent?

The Witness: It represents our prices. It represents the total of our prices.

Trial Examiner Norwood: Yes. Well, what are your prices made up of?

The Witness: Well, Your Honor, our prices represent the sums of money at which we agreed to perform specific things.

Trial Examiner Norwood: Yes.

The Witness: And among those things we agree
32452 to furnish cement at a given specific sum, in a given type of package, at the point where we agree to make delivery.

Trial Examiner Norwood: Yes. I am asking you what is that price composed of?

Now, let us break down that price and see what makes it.

Didn't you testify that you made—or helped make the price—you pass on the prices and all?

The Witness: Oh, yes, I do.

Trial Examiner Norwood: Let us break down that price and tell us.

The Witness: Your Honor, price can't be broken down.

Trial Examiner Norwood: It cannot be broken down?

The Witness: No.

Trial Examiner Norwood: That is the answer.

The Witness: It is a fixed thing; it stands by itself.

Mr. MacIntyre: I would like to ask the witness a further question.

Trial Examiner Norwood: Go ahead.

By Mr. MacIntyre:

Q. Do you mean to say, Mr. Warren, that you have received in your office all of the money as an average per barrel that is shown in the last column of Respond-
32453 ents' Exhibit, for identification, 2343?

A. I know that we have not received all of that.

Q. Who did receive it? Who did receive any part that you did not receive?

A. Railroad companies.

Q. From whom?

A. From our customers.

Q. What part of these figures appearing in the last column of Respondents' Exhibit 2343 was received by the railroads from your customers?

A. Oh, I don't know; I have no concern about that.

Q. You don't care about it?

A. No, that—that does not interest me, Mr. MacIntyre, in the preparation of this; it is not made for that purpose.

Q. But you have included it?

A. No, we have not included.

Q. In making up these figures?

A. Oh, but we have not included it at all.

I would like to make that clear to you, Mr. MacIntyre, so you can understand; this represents the amounts of our several contracts with our several customers for the period.

Q. Yes, I have heard you state that twice.

A. And for those amounts we agree to furnish cement of a given specification, in a given type of package,
32454 at a point which is agreed upon at the time we make the deal.

Q. Do you deliver to that point?

A. We do, yes; we agree to.

Q. By what means?

A. Either by railroad or by truck.

Q. When you turn it over to the railroad, do you pay the railroad the freight to deliver it?

A. In some cases we do.

Q. I am talking about the majority of the instances that are included in the compilation before you, Respondents' Exhibit 2343? Do you pay the freight on the majority of those transactions that are comprehended in that memorandum?

A. The customer pays it to the railroad company for our account, as part of what he owes us in the completion of that transaction.

Q. But he doesn't pay it to you?

A. Well, he pays it, we undertake the obligation; he becomes our agent in paying it to the railroad company, Mr. MacIntyre, as a—

Q. Do you ever get a statement from the railroad com-

pany that they have received this from him for your account?

A. We assume that he has paid it, and we—

Q. I am asking you whether or not that the railroad company gives you a statement that they have received this from the customer for your account?

32455 A. We don't ask for it.

Q. And you don't get it; is that correct?

A. Well, we know that the railroad companies make collection within two days after a bill is through; if they hadn't got it we would hear about it.

Q. But if they never get it, it is no concern of yours?

A. Oh, you bet it is, because it is our contract with the railroad company.

Q. I know, but if the railroad company is willing t ut that in half and not collect but half, you are not concerned with any part of it, are you?

A. That is an imaginary thing.

Q. I am asking you a question now, not whether it is your imagination.

A. Well, I think it is your imagination, Mr. MacIntyre; it is not mine.

Q. Well, would you attempt to collect from the railroad company the full amount of that freight if they collected only half of it from your customer?

A. Well, now—

Mr. Withrow: Your Honor, I object; we are getting—

The Witness: That is a ridiculous thing; that is a silly thing.

Mr. Withrow: We are getting into—

The Witness: That is a silly thing.

32456 A. Well, people—business men—do what they are supposed to do, generally speaking, Mr. MacIntyre,—honorable people.

32459 A. Not any more than this is.

Q. The record is clear as to this now.

Now, Mr. Warren, since you have been notified by your Counsel that they desired you to appear here to testify in this case, have you discussed with anyone the matters about which you were expected to testify here?

A. Will you phrase that again?

Trial Examiner Norwood: Read it.

(Last question read.)

32460 A. Well, I do not know what you mean by "expected" there, Mr. MacIntyre. I have discussed my

views of our methods with a good many people. I have discussed what we do with a great many people.

By Mr. MacIntyre:

Q. Since you were notified that you were to appear here as a witness?

A. What do you mean by notification that I was to appear here?

Q. Well, someone asked you to come here and testify, didn't they?

A. That is right.

Q. Well, since you received such request have you discussed these matters about which you were to testify?

A. I discussed about what we do. I discussed the marketing methods. I discussed many of the things that have been discussed here.

Q. That is, in your testimony?

A. Yes.

Q. With whom?

A. I have discussed it with our attorneys. I have discussed it with my family.

Q. Well, now, in this discussion have you had propounded to you questions in written form?

A. Not in written form. I have had them in
32461 verbal form, Mr. MacIntyre.

Q. You have not seen any questions in typewritten form?

A. Oh, yes, I have seen questions in typewritten form.

Q. Concerning your testimony that you were to give here?

A. Yes.

Q. Did you make any answers to those questions?

A. I did not make answers to typewritten questions; I made answers to verbal questions, Mr. MacIntyre.

Q. You put your answers down in typewritten form?

A. Oh, I did not do it.

Q. Who did?

A. Stenographer who took notes.

Q. Where?

A. In our office.

Q. One of your stenographers?

A. No. One of the attorneys brought a stenographer.

Q. To your office?

A. That is right.

Q. And you put your answers to the questions that had been propounded to you down in typewritten form?

A. No, I just answered the questions.

Q. And they were written down?

A. This young lady stood there and took notes—sat there and took notes.

Q. Have you seen them since they were taken down?

32462 A. I have.

Q. When was the last time you saw them?

A. Oh, I only saw them once.

Q. When was that?

A. It was a month ago, Mr. MacIntyre; four or five or six weeks ago.

Q. You have not discussed them since you have seen them?

A. Have not discussed them?

Q. Yes.

A. Well, now, what do you mean by "them"?

Q. The questions and answers.

A. Oh, I discussed the questions. I discussed the case, the things that are involved here, yes, Mr. MacIntyre.

Q. Well, about those questions and answers, have you discussed those with anyone since you have seen the questions and answers?

A. Have I discussed the questions and answers?

Q. With anyone since you have seen them in typewritten form?

A. You mean those that are on the sheets that they sent to me?

Q. Yes.

A. Oh, I have not—you mean—are you asking me did I take this question and this answer and discuss it in that manner?

Q. Well, I do not know in what manner you dis-

32463 cussed it. I am asking you.

A. Well, Mr. MacIntyre, I think I can best explain this to you by telling you that this case is most interesting to me. I have talked about it as much as anything else during the time since I realized that I must come here and testify. I surely must have talked about it to an awful lot of people.

Q. Now, during this recess that we had last week did you discuss these answers that had been taken down in your office with anyone?

A. The answers that had been taken down in my office? Well, I would not remember. I have discussed it an awful lot. I probably discussed this whole case. But if you refer to the answers that were taken in my office, I do not know whether I have or not.

Q. You can't remember whether or not you have discussed them with anyone?

A. Specifically associated with the answers that were written in my office, no, Mr. MacIntyre. I have discussed many phases of the case.

Q. But you can't remember whether or not you discussed any of the answers that were previously taken down in your office with anyone last week?

A. Oh, the whole discussion would be about the questions and the answers that are involved, yes.

Q. With whom?

32464 A. The same subject.

Q. With whom did you have discussion on such subjects last week?

A. I discussed them with the attorneys.

Q. Did you receive any suggestions in those discussions?

A. From whom?

Q. From the people with whom you discussed these matters last week?

A. Any suggestions?

Q. Yes.

A. What kind of suggestions do you mean, Mr. MacIntyre?

Q. Well, I do not know. I am asking you now.

A. Well, I do not recall any suggestions.

Q. Your memory is hazy on that?

A. Oh, my memory is not hazy. My memory is very clear. I am in doubt as to what you are trying to get at.

Q. The record is clear.

Were the discussions last week about those matters that you have been testifying?

A. Well, I have repeatedly expressed my opinion, my great disappointment to the very apparent attitude that I find here on the part of you folks.

Q. Anyone else express any opinion?

A. On that?

Q. On that or any matters about which you have

32465 been testifying?

A. No, I do not recall any other opinion.

Q. Are you positive that no one did express any opinion to you about the matters about which you have been testifying?

A. Nobody expressed an opinion to me? I could not be positive about that.

Q. Your memory is hazy on that?

A. Well, here, I want you to know what is in my mind. I am most anxious for you to know it. It is not a case of my memory being hazy. If I discuss a thing with you, surely you express an opinion, don't you? Or if I express mine, it is your right to express yours. I think that sort of conversation was going on, yes.

Q. You, then, include—or, it is now your belief and best knowledge and recollection that opinions were expressed to you last week in your discussions with these other people about the matters you have testified?

A. Well, wait. When you say the matters that I testified, I do not recall any specific instance.

Q. Are you prepared to say that no such opinion was expressed to you about your testimony on any of those matters?

A. No, I would not say that.

Q. Have you read the testimony that you gave just before the recess and discuss that with anyone?

A. I have read it.

32466 Q. Discuss it with someone?

A. Yes, I have.

Q. With whom?

A. Discussed it with my wife.

Q. Anyone else?

A. Discussed it with my attorneys.

Q. Any comments made on it by your attorneys to you?

Mr. Leisure: If Your Honor please, I want to object at this time to this third degree method that is being indulged in, and I want to move to strike all the testimony on this point at this time, and to voice just as vigorously as I know how my objection to the methods that are being employed and to the questions.

Mr. Wooden: Your Honor, I just want to say that the methods employed are perfectly legitimate, perfectly in place, and appropriate as a means of appraising the weight to be given the witness' testimony.

Mr. Leisure: And I do not think they are, and I press my objection.

Trial Examiner Norwood: I think that he should give the facts in connection with any investigations he has made or did make in regard to the case, or any preparation that he has made in giving his evidence here. I think that you have brought it out, and the objection is overruled.

32467 A. Mr. MacIntyre, there haven't been any—there have been, I suppose, comments, yes; but there haven't been any comments made that would influence my mind, or change my testimony in any way.

By Mr. MacIntyre:

Q. It is your opinion that it has not influenced you; is that correct?

A. Oh, I am very certain about that.

Mr. Withrow: Your Honor, I object on the additional grounds that any communication between this man,

32468 this witness, and his counsel, is a privileged communication.

Trial Examiner Norwood: Well, these questions are going to discussions while he was—giving his testimony here.

Mr. Withrow: That is right.

Trial Examiner Norwood: You think that those would be privileged?

Mr. Withrow: Your Honor, without—

Trial Examiner Norwood: Any communications as between attorney and client, as such, would certainly be privileged.

Mr. Leisure: Yes, but that is what an attorney is for, to discuss his case with him.

Now, it is none of Mr. MacIntyre's business what he said to his attorney.

Trial Examiner Norwood: But he is just trying to—

Mr. Leisure: Or what his attorney said to him.

Mr. MacIntyre: If Your Honor please, if it was a matter of an attorney discussing the general defense of a case with his client, that is one matter; if it is a matter of an attorney discussing with a witness on the stand testimony that is now in the record, and testimony that is to be added to by that particular witness, and commenting to that witness on the testimony that is in the process of being

32469 given, that is another matter, and we feel that it is not privileged at all.

Mr. Withrow: Without any prima facie showing here that the opinion or testimony of this witness was at all influenced—

Trial Examiner Norwood: Yes.

Mr. Withrow: —there would be no right to go into this matter at all.

I submit that the record is very clear that there has been no such showing. The testimony is directly to the contrary, and Mr. MacIntyre has not gone even to the heart of what he is trying to get at. He has gone about this and
32470 taken up considerable time on the record, and I think this is an improper procedure, and we object to it.

Mr. MacIntyre: There is a pending question, Your Honor.

Trial Examiner Norwood: I am inclined to think that he may bring out these particulars of this witness' preparation, if any.

Mr. Withrow: That is not the—

Trial Examiner Norwood: The objection is overruled.

A. Well, since I have been here, Mr. MacIntyre, I have had lunch with my attorneys.

By Mr. MacIntyre:

Q. Who?

A. Each day.

Q. Who are you referring to when you say "your attorneys"?

A. Mr. Leisure, Mr. Withrow, Mr. Jones, and there have been—I will say to you that the discussions largely have been with regard to the funny things that have hap-
32471 pened, the amusing things. There hasn't been any serious—serious discussion of the case.

32472 Q. Again I ask you, Mr. Warren, has anyone made any comments to you since you undertook your testimony here concerning any of the testimony you have given?

Mr. Leisure: Now, I want to object to that, Your Honor. The question is "any of the testimony that you have given." The question is incompetent, irrelevant, and immaterial, and I object to it.

Trial Examiner Norwood: Overruled.

Mr. Leisure: And I object on the further ground stated by Mr. Withrow, that it is a privileged communication.

Trial Examiner Norwood: Overruled.

Answer the question.

A. Well, Your Honor, it is a—these are things I haven't paid much attention to. I have said, "How do I conduct

myself?" They would say, "You are doing all
32473 right." That's about the extent of any discussion of that kind.

This is a brand new experience to me—I don't know how courts are handled.

By Mr. MacIntyre:

Q. Well, Mr. Warren, has there been any suggestion made to you that you were not doing so good on some of these points?

A. No, I don't think so.

Q. Are you positive of that?

Mr. Withrow: Your Honor, can we have our objection to this whole line?

Trial Examiner Norwood: Yes.

A. Well, there hasn't been anything that has made any impression on my mind, that I remember.

By Mr. MacIntyre:

Q. Not even a suggestion as to how you could improve your answers?

A. No, no, there hasn't ben anything like that, Mr. MacIntyre.

Q. You are positive of that?

A. Why sure, I am positive of it.

Q. Now Mr. Warren, I am showing you Respondents' Exhibits 2341 and 2342, and ask you to state (handing documents to witness)—

A. This is 2343.

Mr. MacIntyre: Will you change the question to
32474 read 2343, instead of 2342.

By Mr. MacIntyre:

Q. —and I will ask you to state whether or not that those two documents do not represent evidence which has been manufactured or made up under your supervision, for use in this case since you became a witness here?

Mr. Withrow: I object to that question, characterizing the type of—

Trial Examiner Norwood: I think that—

Mr. Withrow: —characterizing the document. I think that it will be perfectly proper for him to get the circumstances.

Trial Examiner Norwood: I think that the objection should be sustained.

I think that you might make your question a little more factual there.

32479 By Mr. MacIntyre:

Q. Calling your attention to Mr. Withrow's question, line 16, page 32226, reading as follows:

"Q. Would you tell us, if you recall, what took place in any district meetings of The Cement Institute, that you attended?"

Will you please look at your answer beginning on line 19 of that page, and continue your answer to its completion, and explain it to us?

Mr. Withrow: Before the witness answers that question, I want to point out to Your Honor, that the line of inquiry in which I was engaged at that time referred only to meetings prior to the issuance of the complaint. I do not want that question—the one question that Mr.

32480 MacIntyre read—to carry the inference that I was asking about meetings after the issuance of the complaint. On Your Honor's ruling I did not go into such matters, and I think that ought to be understood.

Trial Examiner Norwood: Well, is that—

Mr. MacIntyre: Well, I am trying to find out now when this witness attended these meetings.

Mr. Withrow, a few moments ago, said his testimony was he did not attend any before the complaint. Now, he says I am not asking about those he attended after the complaint, but those he testified about previous. So, let us hear from the witness, and find out when and what took place.

Trial Examiner Norwood: Answer the question.

By Mr. MacIntyre:

Q. Will you please answer the question that I asked you about that particular testimony on page 32226 (referring to official record)?

A. (Witness refers to record.) It was a gathering of men which I believe was under the heading of the Institute in Cleveland in the fall of 1936. It was a social gathering, as a matter of fact.

Q. Now, you are explaining your testimony on this page I refer to there (referring to record)?

A. That's right.

Q. Is that correct?

32481 A. That's right.

Q. Now, will you please explain in that connection, who attended that meeting, Mr. Warren?

A. They were mostly men that I had never seen.

Q. Well, do you recall the names of any of them?

A. One was George Warren.

Q. Of the Southwestern Portland Cement Company?

A. That's right. Let me see—

Mr. Withrow: Your Honor, I object to going into this, since there is no showing—since the testimony is that it was a social meeting. I do not see how this could have any bearing on any of the issues in the case whatsoever.

Trial Examiner Norwood: The objection is overruled; the objection is overruled.

Let the cross-examination proceed without interruption.

By Mr. MacIntyre:

Q. Can you recall any others that attended the meeting?

A. Well, Mr. MacIntyre, I couldn't be sure; there was quite a group of men there.

Q. Mr. J. B. John of the Medusa Company there?

A. He might have been there; I don't know.

Q. Where was this meeting held in Cleveland?

A. Cleveland Hotel.

32482 Q. Cleveland Hotel. Mr. W. A. Davis, of the Standard Portland Cement Company there?

A. He may have been there; I don't know.

Q. Who called the meeting?

Q. I don't know that. I recall very little of it, Mr. MacIntyre.

Q. Who told you about it, for the first time?

A. Well, I really couldn't tell you; I don't know.

Q. Who presided at the meeting?

A. It wasn't any—there wasn't anybody presiding. We sat there and had lunch at a table, and talked.

Q. How many attended?

A. Oh, quite a few men.

Q. As many as a dozen?

A. I think so, yes.

Q. Do you think it would be about a dozen?

A. Well, that would be a reasonable guess; I am not—I am not certain of it, Mr. MacIntyre.

Q. From what you learned from the men who did attend the meeting, were they cement manufacturers; that

is, the others in addiion to this Mr. Warren of the Southwestern Portland Cement Company?

A. Yes, I think they were representative cement people.

Q. That is, representatives of manufacturers?

A. Yes, I think so; I think so; I think they were

32483 all, as a matter of fact.

Q. And attended this as a district meeting of The Cement Institute?

A. No, I didn't say that; I didn't say that; I am not sure that's right.

Q. Well, now, this answer of yours beginning on line 19, page 32226, attempted to explain why you attend these meetings.

Will you please complete your explanation?

A. (Witness refers to official record.) This explanation I was making there—

Mr. Withrow: Your Honor, I object. There is no showing here that any explanation needs completing. I think that the proper way is to ask questions to get at the facts. To ask the witness to complete an answer, or say your answer is not good enough, how about giving us more, is not proper.

I think that the proper way is to ask questions. The answer in that form is objectionable.

Trial Examiner Norwood: The objection is overruled. Go ahead.

A. The answer I was giving there, I had left my former company and come to Youngstown to take a position with this company. I had been there two weeks, and the man that I had discussed my job with died, and it was a

32484 shock to me, and there was a—the things that went on there that three or four weeks I was not working as a normal business man works, I did not know where I was going to head, or whether the company would keep me or not. I was utterly inexperienced in the business, and my memory is quite clouded,—for a period of six or eight weeks, or more, until I realized that it was just a case of sitting down and going to work.

By Mr. MacIntyre:

Q. Well, this answer of yours that I refer to, indicates that you attended this meeting because of your inexperience in the cement industry, and because the experience that you had expected—of Mr. Schmutz that you had expected to get the benefit of—was then denied you?

A. Oh, that was not my answer. My answer was that I was confused, that I was in a period where my mind was confused, I did not know where I was going to head, Mr. MacIntyre.

Q. Did you learn anything about where you were going to head through the attendance at this meeting at the Cleveland Hotel?

A. No, oh, no, no.

Q. No competitor suggested anything to you as to their experience in the cement industry when you attended this meeting in the Cleveland Hotel?

A. Well, they may have, I don't know—I don't recall.

Q. You have no recollection?

32485 A. No.

Q. What happened at the meeting? Why did you attend it?

A. It seemed to be an opportunity to get a picture of the area I was in. I was new to that territory and new to the men. I did not know who the men were, and—

Q. That is, didn't know who your competitors were?

A. No, I didn't know who they were.

Q. So you wanted to learn who they were? You wanted to learn something about the area in which you were operating?

A. Mr. MacIntyre, I don't know that that's why I went. It would be like you called me and said, "Will you come and have lunch with me, some of my friends are going to be here," and I would say "Yes, Mr. MacIntyre, I will be glad to come." That is about as accurate a statement as I can make of what happened there,—made about as much impression.

Q. Had you heard before you attended this meeting anything at all about basing points, basing-point prices, in the cement industry?

A. I think I have heard of basing-point prices for the last 30 years.

Q. In the cement industry?

A. No, not applied to cement.

Q. Did you know anything about how they were used in the cement industry before you attended this meeting in the Cleveland Hotel with your competitors in the fall of 1936?

32486 A. Oh, I think I did, yes; I am pretty sure.

Q. From whom did you learn that?

A. We—well, like asking me where I learned arithmetic,

Mr. MacIntyre. It is one of the thing I have picked up as I have gone along,—will have a little here, a little there. I can't tell you where I learned it; I don't know.

Q. Can you recall any of the things that were said about basing points at the meeting you attended?

A. Oh, I don't recall any talk of that kind.

Q. Or about sales policies?

A. I don't recall any talk of that, either.

Q. What did the discussion center about, at the meeting?

A. Well, I will bet you $10 to a doughnut hole that it was about politics, and the New Deal.

Q. I don't think you have answered the question; I did not intend to enter into a bet with you. I am after facts now.

Trial Examiner Norwood: Read the question.

(Last question read by Reporter.)

A. It is a pretty safe bet that when we gathered, whenever I gathered with any business men—

Trial Examiner Norwood: (Interposing.) Well, now, you are under oath; I think I would answer these questions in a little more serious vein.

The Witness: Your Honor, I am very serious; I am under oath, and I am most anxious that this man 32487 know exactly what is in my mind, and I don't want to say things that are not so; I want to say what is so.

Trial Examiner Norwood: I just merely referred to your testifying in a more serious way. I think I would do that.

The Witness: Your Honor, he is asking a lot of silly questions.

Trial Examiner Norwood: Well, don't characterize the Counsel's questions here, either.

Read the question.

(Last question again read by Reporter.)

A. I have no recollection.

Q. Were market conditions in the cement industry discussed?

A. Well, if they were, I have no memory of it.

Q. Did the discussion involve the effect of the New Deal Administration?—You mentioned "New Deal" having been mentioned there,—on the question of basing-point mills in the cement industry?

A. It could have; I don't remember that it did.

32488 Q. Isn't it a fact, Mr. Warren, that you learned of this meeting as one that was being held for your benefit by your competitors to inform you of the business conditions in the cement industry in your area?

A. That is not a fact.

Q. You are positive of that?

A. I am positive about that.

Q. But you are not positive as to what took place at the meeting?

A. If it was any meeting for my benefit, I would know about it.

Q. You do not even know whether the competitors considered it for your benefit?

A. They did not tell me. Furthermore, if they were calling me there, Mr. MacIntyre, to educate me, I would know that.

Q. You do not recall who notified you of the meeting?

A. No, I do not.

Q. Or who paid the bill?

A. I do not know that.

Q. Did you pay any of the bill for this luncheon?

Mr. Withrow: Your Honor, I object.

Trial Examiner Norwood: Objection overruled.

A. It has been a long time. If I paid a dollar for my lunch, I wouldn't know that.

32500 Q. It is your present opinion that the goods are not his when you turn them over to the railroad company?

A. Oh, I am positive of that.

Q. Now, with reference to these claims that you told Mr. Withrow that you handled for loss of cement in transit, in whose name were such claims handled by you? Weren't they in your customer's name?

A. The checks from the railroad companies are made out to us in payment for those claims.

Q. But the claim is handed to the railroad company in your customer's name, isn't it?

A. In our name, Mr. MacIntyre.

Q. What?

A. In our name. In our name.

Q. Are you positive of that, Mr. Warren?

A. Yes, Mr. MacIntyre. We file those claims.

32501 Q. You are sure the customer's name was not included in that claim?

A. As the consignee, but we make the claim.

Q. For him?

A. For ourselves.

Q. And the claims are not carried in his name as a loss of goods that you had consigned to him?

The Witness: The claim is in our name, Your Honor.

By Mr. MacIntyre:

Q. Mr. Warren, do you consider that once you place these goods, that is, carloads of cement, in the hands of the railroad company consigned to your customer that you have a right to divert them on your order to any other destination to any other customer of yours?

A. We do.

Q. That is, to a competitor of the man who ordered it?

A. Divert it to anybody. It is still ours.

Q. Divert it to anyone.

32502 Did you ever try to do that?

A. I never had occasion to, Mr. MacIntyre.

Q. You do not know how many lawsuits you would get into, and what would be the result, if you attempted it?

Mr. Withrow: I object to that question, Your Honor. I do not think that has any bearing on the issues, attempting to have a witness who is not a lawyer pass on things—on legal questions. I think the facts are in the record. I have not objected to this because I thought Mr. MacIntyre would finish with this line, but—

Trial Examiner Norwood: Well, this witness is telling us who owns the goods. This is cross-examination. I think it is perfectly proper.

Objection overruled.

Mr. MacIntyre: I do not believe the witness has answered the question.

Trial Examiner Norwood: Read the question.

(Last question read by Reporter.)

A. No.

Mr. MacIntyre: I will admit that that is calling for a conclusion, a legal conclusion.

Trial Examiner Norwood: Let him answer it if he can. If he cannot, let him say so.

The Witness: The answer is no.

Mr. MacIntyre: The witness has been taking
32503 legal positions on this all day.

32513 "Q. Were not such destination prices as you met the equivalent of the basing-point price at

Pittsburgh and Cleveland, plus freight, to the destinations involved?"

A. Mr. MacIntyre, basing-point price is a thing I don't accept.

By Mr. MacIntyre:

Q. Well, we will call it basing-point figure, anything so that we can—

A. If you had said—if you want to make that base,—a great many of the prices that we used reflected a base, plus the freight.

Q. From—

A. From that base.

Q. From Cleveland and Pittsburgh?

A. From Cleveland and Pittsburgh.

32514 Q. Yes.

A. And other points, Toledo and Ironton.

Q. Isn't that true with respect to the points that take most of your volume?

A. No.

Q. Well, what percentage of your volume do the points take?

A. Did you say most?

Q. Yes, that are controlled by those two bases,—that reflect prices at those two bases, Pittsburgh and Cleveland.

A. It would require a little study to answer that, Mr. MacIntyre.

Q. Well, do the best you can.

A. A great deal of our volume is sold at prices that could be figured back to base at either Cleveland or Pittsburgh, plus the freight from those points.

Q. Well, would it be as much as 50 percent?

A. Well, I am not sure about that. I think that would be a reasonable thing, yes.

Q. That is, to those two bases?

A. I would think so, yes.

Q. Pittsburgh and Cleveland?

A. I would think so. It is pretty hard, Mr. MacIntyre, you know that, without a study.

Q. Well, now, referring specifically to this Cleveland price. Was it your understanding that the price

32515 quoted to the various destinations in the territory contiguous to Cleveland is the Cleveland base figure plus an arbitrary trucking charge to such destinations?

A. Frankly, I don't know what it was.

Q. You don't have any knowledge on that at all?

A. No, I don't have much occasion to, we know what the—

Q. You have told us about breaking down all of these prices that you quoted to the Federal Government, and some other customers, such as the State of Pennsylvania, on the basis of Lehigh Valley plus freight, from Lehigh Valley to the destination, after deducting the freight from such figure back to your mill, and so on, and you say you never have done it with respect to Cleveland.

A. Well, it doesn't figure back—Cleveland doesn't figure back to any freight that I am familiar with. The Cleveland metropolitan area, that is added to that base, it doesn't add up.

Q. That is, when you take the actual freight from Cleveland to the points, it doesn't figure up?

A. I am talking about Cleveland Metropolitan area now, Mr. MacIntyre.

Q. Yes, that is what I am talking about. It does not figure out?

A. No.

Q. Isn't it a fact that there is an arbitrary
32516 rather than actual freight that is involved in the Metropolitan Cleveland area?

A. Well, you see, Mr. MacIntyre, we accept the price that's there, and sell at that price.

Q. Well, don't you know that there is an arbitrary involved there, Mr. Warren, as a freight factor?

A. Well, if you will define arbitrary as a price that does not reflect base plus freight, I will accept your statement.

By Mr. MacIntyre:

Q. Well, I was referring to a freight factor that is not actual, but is constant, with respect to its application from Cleveland to a number of destinations.

A. —of course, there, you get into the thing that I am not concerned with. The only thing I am concerned with is what price we can get for our cement there at that point.

Q. Well, you do break it down, don't you, and determine in so breaking it down that there is a constant
32517 freight factor, that is not the actual freight factor that applies in those destination prices you quoted, when added to the Cleveland base?

A. No, I don't think we break it down, Mr. MacIntyre.

Q. Do you mean to say that you have never determined that?

A. Well, now—you are into a thing that I haven't concerned myself with, at those points—the thing that concerns me, Mr. MacIntyre, is what destination price we can get.

Trial Examiner Norwood: Wait—wait.

You just make answers to his questions there, whether or not it is about something that concerns you, or something that does not. You have answered several questions with that comment, and we will get along much faster if you make direct answer to the questions.

Read the question.

(Last question read by Reporter.)

A. I would say that.

Trial Examiner Norwood: Have you or have you not?

The Witness: I don't remember doing it, Your Honor. I am very sorry if I—if I have not answered these things right.

Trial Examiner Norwood: Just answer the question; and do not answer some other question.

By Mr. MacIntyre:

Q. What is the amount of this figure applicable 32518 at the Cleveland base that you figure back to to determine?

Mr. Withrow: Your Honor, he has testified that he cannot remember ever having done it.

Now, to ask him what the factor was, assuming that he did it, I think is an improper procedure. I do not think that Counsel for the Commission should do that. It is an improper question and I object to it.

Trial Examiner Norwood: Read it.

(Last question read.)

Trial Examiner Norwood: The objection is overruled. You may answer that, if you know.

A. Well, Mr. MacIntyre, I am still talking about the Cleveland Metropolitan district, and I just said that I did not recall.

By Mr. MacIntyre:

Q. Well, don't you figure back to a Cleveland base figure from quotations in the Cleveland area, and outside of the metropolitan district?

A. Oh, yes, we do.
Q. All right.
A. Yes, we do.
Q. After you have figured back, what do you determine the Cleveland base to be, after deduction of the freight?
A. The Cleveland base is $1.50.
Q. $1.50?
32519 A. Yes.
Q. All right.
Haven't you added to that $1.50 some additional factor in determining and figuring out delivered price quotations to points within the Metropolitan Cleveland area?
A. Oh, I don't recall that we have.
Q. Well, isn't it a fact that all of the delivered price quotations in the Metropolitan Cleveland district bear a constant relationship to this $1.50 Cleveland base figure?
A. The prices in that area are the same.
Q. Yes.
A. That is one price in that whole area.
Q. Yes. They are constant.
A. You would have to.
Q. Yes, and what is it?
A. Well, now, can I have a piece of paper?
Q. I will give you several which are quotations, and some of them are fairly reasonable, probably they would refresh your recollection on that (handing to witness exhibit).
Trial Examiner Norwood: Off the record.
(There was a discussion off the record.)
Trial Examiner Norwood: On the record.

By Mr. MacIntyre:
Q. Now, in referring to Respondents' Exhibits 2—
A. (Interposing) Give me a piece of scratch
32520 paper and I will figure those for you; it will take me just a moment.
Q. (Handing paper to witness.)
A. And a pencil?
Q. (Handing pencil to witness.)
A. (Witness figures on pad.) In Cleveland the price in paper is $1.94, and 15 cents off for sacks, $1.79. You go back to $1.50, less a dime, leaves you 29, as the constant factor.
Q. So there is a constant freight factor or transportation factor of 29 cents that applies as an addition to the

Cleveland base figure of $1.50 in making up all of the delivered price quotations for the Metropolitan District of Cleveland?

A. I think you may call that a transportation factor, yes.

Q. And it is constant, irrespective of whether the actual charge is constant; is that correct?

A. Well, now, you see—I don't know about the charge, there.

Q. Well, I say, irrespective of the fact as to whether the actual charge is constant for a haul of 5 miles or 25 miles, the factor is constant?

A. Well, this factor is constant.

Q. Yes.

What area is embraced in this metropolitan district that we have been talking about?

A. Well, that's Cleveland and suburbs—I think all of Cleveland and suburbs.

Q. It runs along the lake for a distance of almost 32521-50 miles, doesn't it—from east to west?

A. I would hardly think it would be that long, Mr. MacIntyre.

Q. Well, how long is it?

A. Well, I am not just sure; I don't know.

Q. How far inland does it come? It includes Berea, doesn't it?

A. Well, I am not sure about that.

Q. Well, it includes Willoughby—a little town to the east, doesn't it?

A. I don't recall—I don't recall, Mr. MacIntyre.

Q. And Rocky River on the west.

A. I don't recall.

32522 Washington, D. C.,
Thursday, February 15, 1940.

32523 F. B. WARREN thereupon resumed the stand and testified further as follows:

Cross-Examination (Continued) by Mr. MacIntyre:

Q. Mr. Warren, at the close of the day yesterday we were discussing the territory that is embraced in the Metropolitan Cleveland area.

I now hand you Respondents' Exhibits 2288 to 2294, inclusive. I will ask you to state—that is, to look at those and then state whether or not you can cite any location that is described on those invoices to which you made shipments that is not embraced in the Metropolitan Area of Cleveland.

A. Mr. MacIntyre, do you want me to look all these through?

32524 Q. Well, if you have any knowledge of any appearing in there, just cite it to me; that is, of any location that is not included in that area.

Mr. Withrow: Your Honor, the testimony is that those are from the Metropolitan Area of Cleveland. I think we are wasting time, unless Mr. MacIntyre has a purpose which I do not see. I do not see why we should go through examining 635 invoices here to check, unless Mr. MacIntyre is now going to dispute as to whether some of those are from the Metropolitan Area of Cleveland.

Mr. MacIntyre: I do not dispute it, if Your Honor please, but the testimony is in the form of a statement by Counsel. I want the statement from the witness now as to whether he agrees with his Counsel.

Trial Examiner Norwood: Is that correct?

The Witness: Yes.

Mr. MacIntyre: That is all. It does not take so long if a man knows.

By Mr. MacIntyre:

Q. I will also ask you, Mr. Warren, with respect to the delivered prices that appear on Respondents' Exhibits 2288 to 2294, inclusive, if they are the equivalent of the Cleveland base plus this constant freight factor that we were discussing yesterday afternoon.

A. Mr. MacIntyre, I wouldn't know.

32525 Q. Well, can you cite any instance among those where that is not the fact?

A. They are the prices at which we sold.

Q. Yes, I know, but I am asking you a different question. I am asking you if the delivered prices appearing on these Respondents' exhibits are the equivalent of the Pittsburgh base plus this arbitrary or constant freight factor that applies in the Metropolitan Cleveland area.

Mr. Withrow: Your Honor, I object.

Mr. MacIntyre: I mean Cleveland instead of Pittsburgh there, Mr. Reporter.

Mr. Withrow: The invoices speak for themselves as to what they are the equivalent of. And I think we are wasting time. This whole matter was gone into yesterday afternoon. The invoices speak for themselves.

Trial Examiner Norwood: Well, we can ask him some general questions for our information, I think, about that.

Objection overruled.

A. Well, Mr. MacIntyre, I am quite sure these are the prices at which we sold.

By Mr. MacIntyre:

Q. Yes, we agree, but can you cite any instances from among those where they are not the equivalent of the Cleveland base plus the contsant, or arbitrary

32526 freight factor, such as we were describing yesterday afternoon?

A. I never checked for that purpose, and I have never studied it for that purpose, from that standpoint, to arrive at such a conclusion as that.

Q. Well, what is your policy in that respect, Mr. Warren? Isn't it a fact that you do, as a matter of policy, sell in Cleveland, and did during the period that you made the shipments that are shown by these Respondents exhibits, at prices that are equivalent to the Cleveland base, plus this constant freight factor? You have investigated your business enough to answer that question, have you not?

A. Our concern has been to get the best price we could get at those points, and it has been limited by the prices that were quoted by competition.

32528 Q. You have described how you figured the component parts of the various delivered prices in other parts of your shipping territory, especially with respect to the State of Pennsylvania and other points; do you mean to tell us that you have never done that with respect to the Metropolitan Cleveland Area?

32530 A. My investigation has been constantly to find what prices we had to meet at these destination points. In some cases—we have made a lot of assumptions; as a matter of fact most of our prices are assumptions as to what—or many of them are assumptions as to what we will find, as to what we will have to do.

32535 The Witness: I am most anxious to get my statement clear.

Trial Examiner Norwood: Go ahead.

The Witness: We quote prices to compete with the prices that we find. Now, in the Cleveland Metro-
32536 politan Area they don't seem to add back to base plus freight; that is, on the same comparison that they add back to base plus freight as you get outside that area.

Trial Examiner Norwood: Yes.

By Mr. MacIntyre:

Q. But analyze them in the same way, do you not, Mr. Warren, for the purpose of determining whether or not that they figure back to a constant base figure?

A. Oh, I think we do that, yes.

Q. In both instances.

Now, you run into the Metropolitan Area of Cleveland. How do you determine how this constant freight factor begins its application and where it ends its application with respect to this dividing line of the Cleveland Metropolitan Area and the hinterlands thereabouts?

Mr. Withrow: Your Honor, I object. There is no testimony in the record that there is a constant freight factor that was ever added.

Trial Examiner Norwood: Objection overruled.

Read the question.

(Last question read.)

A. I do not know about the constant freight factor, but wherever we find points, customers who have prices that reflect base plus freight, we follow them, and where they do

not follow that, we follow the prices that are in the
32537 hands of the customers that we are selling to.

32545 Q. Now, can you tell us now how it affects your thought in making prices; that is, the location of the competitor's mill?

A. It affects my reasoning in studying whether we might or might not succeed or fail if we made an effort to sell f. o. b. the mill.

Q. Well, how is that?

A. I think I illustrated the other day: if none of them were there we would be utterly independent. We
32546 could, if we chose, sit there at home and wait for the people to come; if enough of them came, why, it is conceivable that we might be satisfied with that.

Now, the fact that they are there, the fact that these other mills are near us, offering cement, influences much of my thought.

Q. In what manner?

A. By forcing me to realize that we are faced with very strenuous competition, of competitive effort for that business, and that we cannot go out and act as we would if those forces were not there in our way.

Q. You mean by that, that you would not be able to charge $5 a barrel, or more, such as you indicated on your direct examination; is that what you are referring to?

A. Yes, somewhat. I want to make clear that I don't think $5 a barrel is a proper price for cement.

Q. No, but you testified on direct that if they were not there you could charge $5 or more a barrel,—is that what you are referring to now?

A. We would have that independence, we would not have to be concerned about what price somebody else might make; we could make a price which we saw fit.

Q. The sky is the limit, so to speak?

A. The sky is the limit—no, I don't think that would be proper. I would hate terribly to have that recorded
32547 here as my feeling about the proper price of cement; rather than the sky the limit, I would feel that we want to do that job, that is, make a price that would be inviting to people to buy, low enough for them, and high enough to permit us to carry on our business successfully and properly.

32550 By Mr. MacIntyre:

Q. Mr. Warren, you testified that the average
32551 mileage that you ship your cement is 70. Do you recall your testimony on that point?

A. I think I said between 70 and 80, Mr. MacIntyre.

Q. Between 70 and 80?

A. Yes.

Q. How far is Pittsburgh from your mill?

A. About 50 miles to the edge of Pittsburgh. I would say 53, 54, 55 to the heart of Pittsburgh.

Q. What about Cleveland?

A. Cleveland is about 80, 85.

Q. Cleveland takes more of your cement that Pittsburgh, doesn't it?

A. No.

Q. About how much?

A. Well, I am talking about the metropolitan area in both cases. I would say Pittsburgh takes twice as much.

32556 Q. Now, you testified that you are not a dominant factor in price changes in your area. You recall that?

A. Yes.

32557 Q. You have testified, however, that Alpha, Huron, and Medusa have been leaders in price changes. Can you add to those three the name of the Lehigh Company as one of the leaders in price changes in your territory?

A. Well, now, I can't, and I think I testified that I thought Alpha and Medusa and Huron led in the prices. By that I meant the quotations that we found. I do not recall Lehigh.

Q. Now, at line 23, page 32170, you stated that if you made prices f. o. b. your mill it would prevent you from entering into competition.

In what manner would it so prevent you, Mr. Warren?

A. I do not recall saying that it would prevent us. If I did, I would like to change that word and make it "hampers us in our efforts to compete."

By Mr. MacIntyre:

Q. All right.

How would it hamper you?

A. I believe I explained that, Mr. MacIntyre. Do you want me to repeat it?

Q. Well, if you think that you explained it and that the explanation in that place in the record is sufficient on it, generally, we will let that stand; but I would ask in
32558 that connection a specific question:

If you made f. o. b. mill prices, wouldn't it prevent you from quoting your customers a delivered cost to them that would be uniform and identical at any given destination with a quotation of your competitors?

A. Well, I can't put together selling f. o. b. mill and selling at delivered cost. They are two separate and distinct things. I do not—you could not do those two things in the same deal, in my opinion.

Q. Well, I am talking about—

Trial Examiner Norwood: Do you refer to selling at a uniform f. o. b. mill price?

Mr. MacIntyre: At any given moment, yes, to all customers at any given moment.

Trial Examiner Norwood: Yes.

Mr. MacIntyre: I would like the Reporter to read the question back to the witness, if he should need it.

Trial Examiner Norwood: Read the question, please.

(Last question read by Reporter.)

Mr. Withrow: Would you read his answer also, please?

Trial Examiner Norwood: Read it.

(Last answer read by Reporter.)

Mr. MacIntyre: Well, the answer is not an answer to my question, and I did not say "sell at delivered cost" on f. o. b. mill. I said "quote at delivered cost." It is
32559 a different thing in quotation and selling.

Mr. Withrow: Your Honor—

Trial Examiner Norwood: Well, would it prevent you from selling?

Mr. MacIntyre: No, from quoting.

Trial Examiner Norwood: So that the delivered cost to the customer would be the same—the delivered cost, that would result from the same customers purchasing from some other manufacturer?

The Witness: Your Honor, that question strikes me as a theoretical thing that could not have a practical application, and I don't know how I could answer that question.

Trial Examiner Norwood: You cannot answer that?

The Witness: I don't know how to answer it.

Trial Examiner Norwood: All right.

By Mr. MacIntyre:

Q. Well, you do know, don't you, Mr. Warren, that you couldn't make a quotation to a customer at a given point—

Mr. Withrow: Could I have that question read?

By Mr. MacIntyre:

Q. —equal to a quotation made by your competitors at the same point, if you were selling and they were selling only on f. o. b. mill prices?

Mr. Withrow: Your Honor, I would like to object
32560 to that question. I thought that this case was about facts. Apparently now all we want to know is philosophy,—if the issues of this case are based on philosophy, I suppose we should bring in philosophers.

That question does not ask for a single fact, and asks for the witness to speculate on something that might happen in the future.

Trial Examiner Norwood: No, this witness was permitted to give his reasons for not making his mill a basing mill.

Mr. MacIntyre: Over our objection.

Trial Examiner Norwood: His reasons for pricing there. I let him go into that because we wanted the whole story here.

Mr. Withrow: Yes, but it—

Trial Examiner Norwood: It really is involved in the matter of motive—

Mr. Withrow: But Your Honor—

Trial Examiner Norwood: —and effects.

Mr. Withrow: —he hasn't been asked here for his reasons for doing anything. He is asking about a hypothetical situation to speculate about it.

Trail Examiner Norwood: The objection is overruled. This is testing those reasons.

Read the question.

32561 (Last question read by Reporter.)

Mr. MacIntyre: Will you change the word "equal" to "identical with."

Trial Examiner Norwood: Yes.

(Last question read as amended as follows:

"Q. Well, you do know, don't you, Mr. Warren, that

you couldn't make a quotation to a customer at a given point identical with the quotations made by your competitors at the same point, if you were selling and they were selling only on f. o b. mill prices?").

A. It would be impossible, and I couldn't conceive of doing it, selling f. o b. mill and quoting f. o. b. a given point away from the mill. It seems like an impossible situation to me, Your Honor.

By Mr. MacIntyre:

Q. In other words, you couldn't do that if you did also quote—I mean sell—f. o. b. mill? Is that what we are to understand from your testimony?

Mr. Withrow: Could I have that question read?

Trial Examiner Norwood: Read it.

A. What I want to understand it, that I cannot sell f. o. b. my mill and at the same time sell those same goods f. o. b. the customers' point?

By Mr. MacIntyre:

Q. I am not asking you about the selling at destination point. I am asking you now about quoting delivered
32562 at destination point, equalizing that delivery cost with your competitors, and making it the same.

A. Well, if I quoted him a delivered cost and he accepted it, that would become a sale.

Q. I am not talking about his acceptance; I am talking about your quotation now, Mr. Warren. Let us get on common ground on that.

Trial Examiner Norwood: Making such quotation as would result in an identical delivered cost to the customer.

By Mr. MacIntyre:

Q. As would be quoted by his competitors to the same customer, or at the same destination.

Trial Examiner Norwood: That is it.

The Witness: Could I have that question stated again, Your Honor, exactly?

Trial Examiner Norwood: Read it.

(Question read is follows:

"Q. In other words, you could not do that if you did also sell f. o. b. mill; is that what we are to understand from your testimony?"

A. Well, there has been so much said here.

Mr. Withrow: Hasn't that question been answered?

Trial Examiner Norwood: He hasn't answered it yet.

A. I am just as sorry as I can be, but I can't
32563 answer that question to save my soul.

Trial Examiner Norwood: If you sold at a uniform f. o. b. mill price, could you then make prices at various points that would serve to insure this identical delivered cost to your customer with those that would result from his purchasing from competitors—is that clear?

The Witness: Well, my problem there is to find how we make a price f. o. b. mill and a price at the different points at the same time.

Trial Examiner Norwood: My question does not include that at all.

If you made a uniform f. o. b. mill price, could that ever result in an identical delivered cost to a number of customers; that is, identical with what the delivered cost would be on their purchases from other manufacturers?

The Witness: Oh, that is clear, now.

That would depend entirely on what the customers—what our competitors did.

By Mr. MacIntyre:

Q. Well, do you think that they and you could make the same quotation of that delivered cost, Mr. Warren?

Mr. Withrow: Your Honor, I object to that question; it is purely speculative. This witness cannot testify about what his competitors could do. I think that this
32564 line of inquiry—

Trial Examiner Norwood: Now, he has told us—

Mr. Withrow: —has gone beyond the scope of the direct examination.

Trial Examiner Norwood: He has told us that certain results would flow from f. o. b. mill selling, or told us why he refused to sell f. o. b. mill.

Now, I think that the Counsel on cross-examination may go into his reasons therefor.

Mr. Withrow: Well, Your Honor, we have no objection to going into his reasons therefor, but we think this is entirely speculative; it has nothing to do with his reasons whatsoever.

Trial Examiner Norwood: I do not think so.

The objection is overruled.

The Witness: Can I have that question again, please?

Trial Examiner Norwood: Read the question.

(Last question read by Reporter.)

Mr. MacIntyre: "Under those circumstances" I want to add to that question.

(Last question read as amended as follows:

"Q. Well, do you think that they, and you, could make the same quotations under those circumstances of that delivered cost, Mr. Warren?")

32565 A. You see, Mr. MacIntyre, you are talking about a quotation f. o. b. mill and a quotation at delivered cost in the same sentence, and I—I would love to answer your question.

Trial Examiner Norwood: You are not asking him as to his quoting a delivered cost price; you are asking him whether or not if he quoted a flat mill price that it would ever work out to a destination cost that would be identical.

Mr. MacIntyre: Whether he and his competitors could work it out.

Trial Examiner Norwood: For the destination costs of the same goods delivered at the same point by a competitor.

Mr. MacIntyre: Yes. That is what I have been trying to ask him for the last 30 minutes.

Mr. Leisure: Well, why don't you ask him.

Trial Examiner Norwood: Maybe he can show us.

Mr. MacIntyre: It has been asked him some half dozen different time in different language.

Mr. Withrow: I assume that we have our objection to this line of inquiry, Your Honor?

Trial Examiner Norwood: Yes, the entire line.

A. Mr. MacIntyre, that is a speculation I have never made, and I am not competent to answer that question.

By Mr. MacIntyre:

32566 Q. This was the basis of the speculation that you did make at line 3, page 32170, as to how it would hamper you to make f. o. b. prices (referring witness to official record).

Mr. Withrow: Your Honor, I submit that Mr. MacIntyre is again misstating the record. The record states his reasons, and very clearly, and if Your Honor would like to see them or have them read, I will be very glad to do so.

Trial Examiner Norwood: Listen, he has a perfect right on cross-examination to ask him to repeat those rea-

sons without jogging his memory there and reading from the record on it.

Mr. Withrow: That is the reason I did not read the record myself.

Trial Examiner Norwood: Yes.

Mr. Withrow: And suggested that I would show it to you.

Trial Examiner Norwood: Yes.

Mr. Withrow: But Mr. MacIntyre's statement misquotes the record in its present form, and I object to the question on that ground.

Trial Examiner Norwood: Read the question.

(Last question read by Reporter.)

Trial Examiner Norwood: The objection is overruled. He has a perfect right to ask that, and ask him to repeat his specific—

32567 Mr. MacIntyre: Now, if Your Honor please, I want to explain why I have changed the word in that; I changed it from "prevent" to "hamper" because the witness has just testified a few moments ago that he believes that "hamper" would be the better word.

Trial Examiner Norwood: All right.

Mr. Withrow: What is more different than that, Your Honor?

Trial Examiner Norwood: Now, answer that question.

The Witness: Would you please read the question again?

Trial Examiner Norwood: Read it.

(Last question re-read by Reporter.)

A. Well, the basis of that, Mr. MacIntyre, was the fact that I was impressed with what appeared to be a tremendous drive on the part of Government bodies to force us into selling f.o.b. mill, and I studied what might happen to our business—

By Mr. MacIntyre:

Q. Well—

A. —if we were forced to do that.

Q. Well, what was the result of your study as it affects this particular question that I have just asked you?

A. Then you are asking me to review my reasons for not wanting to sell f.o.b. the mill?

Q. That is, in so far as you have found that it 32568 would hamper you, as you stated.

Mr. Withrow: I object to the question. It is not clear, and it misstates the record.

Trial Examiner Norwood: The objection is overruled.

A. (Witness makes no response.)

Mr. MacIntyre: Oh, I simply give up on the thing. I have been trying to get what is an obvious answer out of this witness for 30 minutes. I will have to go to another subject.

32569 By Mr. MacIntyre:

Q. Mr. Warren, you have stated that you considered it your right to bid on Government work on any basis that you so desired, and, in that connection—that is, along in your discussion where you made such a statement—you stated that these requests for f.o.b. mill prices that the Government had made would tend to eliminate you from competition, if the Government had been successful, that is, would eliminate you in some instances from competition if the Government had been able to successfully buy cement under the invitations.

Now, in that connection, I will ask you this question:

Do you consider that you have a basic right not to be eliminated from competition in the Government's effort to buy pursuant to competitive bidding under seal according to Statute 3709?

Mr. Withrow: Your Honor, I object to that question: first, it misstates the record; second, it is not relevant and material to any of the issues in this case. The opinion of this witness as to what such a right should be is not
32570 relevant and material, and I further object to it, as going beyond the scope of the direct examination, and I object to that portion of the question—or, really, to the entire question—because it is nothing more than a speech by Counsel for the Commission.

Trial Examiner Norwood: Read the question.

(Last question read by Reporter.)

Trial Examiner Norwood: You might answer that.

The objection is overruled.

Mr. Withrow: And I would like to point out that the question is entirely argumentative; it does not give us any facts, Your Honor.

Trial Examiner Norwood: Well, the witness can—

Mr. Withrow: It is a question that you would propound to a lawyer—

Trial Examiner Norwood: The witness can answer in the same vein.

Mr. Withrow: —it is a legal question.

Mr. MacIntyre: He has testified in the same vein over our objection.

The Witness: Your Honor, I don't think I said that I thought I had a basic right to bid on any basis I saw fit.

Trial Examiner Norwood: You do not think—

The Witness: That is not the way.

32571 Trial Examiner Norwood: You do not think you should bid free from competitive conditions, do you?

The Witness: And I don't know the law that he refers to at all.

Trial Examiner Norwood: I see.

The Witness: I feel merely as a bidder I want to know as clearly as I can what is going to—what things are going to influence the bu[illegible]—

Trial Examiner Norwood: Yes.

The Witness: —in his determination as to whether he gives the business to me or to someone else.

32576 Q. There has been considerable discussion by you in your direct testimony about your dealers, Mr. Warren. When you refer to persons as your dealers do you consider you are referring to a person who is your agent, handles your cement, and is responsible to you for its loss from his warehouses, for the amount that he gets for it, the expense of running his warehouses, and all of that?

32577 A. There is no mutual financial interest, Mr. MacIntyre.

Q. He is merely a purchaser of your cement from you?

A. He is more than a purchaser. He is—he helps us to get the cement into the hands of users.

Q. Well, is it your cement or is it his cement after he buys it from you?

A. It is his cement.

Q. So he is helping himself to get the cement he bought from you into the hands of the users; isn't that correct?

A. It is still our brand name. That is the thing that is mutual to the two of us.

Q. But he has bought it, hasn't he?

A. He has bought it.

Q. He could have dumped it in the river had he desired it, couldn't he; even if it carried your brand name?

A. Oh, you bet. We would not have interfered with that. We would like to have a lot of customers buy it and dump it in the river (laughing).

Q. Now, you testified, Mr. Warren, that you would lose a great number of your dealers, you believed, if you did quote f.o.b. mill. Do you recall that?

A. Yes, I believe we would.

Q. That is, you still think that that would hold true if you quoted the Government f.o.b. mill for W.P.A. projects?

A. Well, now, I do not think—I am just trying to
32578 patch that together there. I do not quite get your distinction between quoting the Government f.o.b. mill and dealers f.o.b. mill.

Q. Well, I do not think you made any distinction when you made that statement in the record. I am trying now to find out whether there should be a distinction.

Do you think that you would lose any dealers, dealer-customers of yours, if you quoted an agency of the Government f.o.b. your mill when your competitors were not also quoting that same agency f.o.b. their mills?

A. It could have that effect.

Q. What would be the effect if your competitors also quoted f.o.b. mill to the same agency? Would you lose dealers then?

A. I think if we were quoting the Government direct on business, that the dealers could handle better, it would serve to weaken the dealers, weaken our relationship with them.

Q. Whether your competitors do it or not? Is that your testimony?

A. Well, the fact that competitors did it, if we followed competitors into a practice, we would get less criticism—we would get much less criticism than if we started the thing.

Q. You think you would lose dealers if your competitors did it, but you would not lose as many if you did it and your competitors also did it; is that correct?

A. Will you read that question? I think I agree with you, Mr. MacIntyre.

32579 Mr. MacIntyre. Will you read the question to the witness?

(Last question read.)

A. Let me state it and see if you agree with me. I think that if we followed competitors into a practice,

if we were forced by their activities into a practice which we can deal with, it would entail less resentment from our dealers than it would if we led the way into such a practice.

By Mr. MacIntyre:

Q. You would not lose so many customers if you and your competitors did it at the same time?

A. Well, those things are intangible, but very positive. You can hardly put your finger on a specific thing, but in a general way they exist—in a very strong way.

Q. I realize it is all speculative. That is the reason we objected to it when you testified to it on direct. We just go into it to see what the basis of that speculation was, Mr. Warren. Now, we will get into something that is not speculative.

You do sell at least one railroad f.o.b. your mill, do you not?

A. We sell them f.o.b. cars on their rails.

Q. And some of those rails are at your mill, aren't they —that is, within a foot or two?

32580 A. (Laughing.) They are on our property, Mr. MacIntyre.

Q. And you sell them f.o.b. rails?

A. That is right.

Q. At your mill?

A. That is right.

Q. How many dealers have you lost by doing that, Mr. Warren?

A. Well, that is a practice that was going on when I came with the company. As to the loss of dealers, I wouldn't know about it.

Q. You do not know of any.

I believe when Respondents' Exhibit 2312 was offered in evidence we asked you on voir dire whether or not that you considered that you could state that that was a truthful statement appearing at the bottom of the letter, and you said that you could, and you did. You vouched for its truthfulness and accuracy (handing the exhibit to the witness).

Can you tell me now what is the basis of your knowledge that permits you to vouch for the truthfulness and the accuracy of that statement by a salesman of yours from West Virginia to you?

A. What statement do you refer to, Mr. MacIntyre?

There are a number of statements—there are a number of sentences.

Q. Yes, but in the handwriting of this salesman, who was covering territory, I believe, in West Virginia and southern Ohio. Isn't that correct?

32581 A. I think they are all West Virginia.

Q. Yes, West Virginia.

A. Now, what is your question?

Q. What led you to believe or led you to make the statement during your direct examination on voir dire to the effect that you could vouch for the accuracy and truthfulness of those statements that that salesman made?

A. Your question is with reference to the statements made by the salesman?

By Mr. MacIntyre:

Q. Those statements on 2312 made by the sales-

32582 man on that exhibit.

A. The salesman—

Trial Examiner Norwood: The ruling is based on my impression that Counsel is right and that he has made the statement. If we find in the record that that is not the case, I will strike the testimony.

Go ahead.

A. The statement is: "Due to dealers' attitude in Morgantown, Grafton, Clarksburg area, also Wheeling area. I think we had better confine our direct bidding south of the B. & O. main line at present."

I know that is what he thinks.

"I will advise you my opinion on jobs to be bid for next few weeks."

Now, I know that is what he thinks, and that is what I meant when I said I vouch for the truthfulness.

By Mr. MacIntyre:

Q. What about the expression "dealers' attitude" there, Mr. Warren? "Due to dealers' attitude" he was going to do this.

A. He said "Due to dealers' attitude."

Q. Yes.

A. I know that is what he thinks, and that is the basis of my statement.

Q. He said "Due to dealers' attitude." The whole thing is tied up with that phrase. How do you vouch for

32583 the truthfulness and accuracy of his statement that what he thinks there is due to dealers' attitude?

Mr. Withrow: I object to this line. There is no testimony in the record—

Trial Examiner Norwood: Objection overruled.

Mr. Withrow: —that he vouched for the dealers' attitude.

Mr. MacIntyre: Again I will have to go to the record.

Trial Examiner Norwood: I am of the firm belief that he did.

Mr. Withrow: He vouched for the statements of his employees, and the record so shows.

Mr. MacIntyre: Truthfulness and accuracy.

Trial Examiner Norwood: Go ahead and answer.

The Witness: Your Honor, his statement is "I think" —he gives his reasons for doing so, and I know that is what he thinks. That is my foundation for saying that that is true.

By Mr. MacIntyre:

Q. In other words, you are relying on what he said? You believe it is truthful and accurate because the man said it; is that correct?

A. (Laughing.) Mr. MacIntyre, he has urged us—if he did not want us to make these bids the way he sug-
32584 gested, he would not say so.

32593 Q. Mr. Warren, you testified that you sell your cement to some dealer-customers who are members of dealers' associations and some who are not members of dealers' associations.

Do you recall whether or not Mr. E. J. Holway in Youngstown, Ohio, is one of your customers?

32594 A. Mr. Holway, himself, is not a customer. The Youngstown Ice Company is.

By Mr. MacIntyre:

Q. He is one of the officers—directors—managers of the company?

A. That is right.

Q. And he has been a customer of yours since 1936, hasn't he, since you have been with the company?

A. Yes, ever since I have been with the company.

Q. Is Mr. W. W. Campbell, of New Wilmington, Pa., one of your customers?

A. Well, it is the Campbell Company.

Q. Yes.

A. I think that is the name.

Q. He is one of your customers?
A. Yes, we sell him.
Q. You sell the Gof-Kirby Company in Cleveland, do you?
A. Yes, we sell them.
Q. Cleveland Builders Supply Company in Cleveland?
A. Yes.
Q. Do you sell Joseph Alcorn in Youngstown?
A. I think it is Alcorn Coal & Supply.
Q. Yes.
A. Joseph Alcorn is interested in it.
Q. Yes. You sell him?
32595 A. Yes, I sell them.
Q. You have been selling him since 1936?
A. I do not think quite that long. I think there was a time when we could not sell him, Mr. MacIntyre.
Q. Were those gentlemen that I have named among the dealers who have stated to you that they did not particularly care for truck deliveries of cement and it would hurt their business?
A. Well, now, I do not recall saying that they had said that they did not care for truck deliveries. I do not recall any of them asking us for truck deliveries, Mr. MacIntyre.
Q. Well, isn't it a fact that they are among the dealers who have expressed themselves to you as being out of favor with the trucking of cement? You testified on direct as to a number of dealers who expressed disfavor with trucking. Aren't those men among those that so expressed themselves?
A. Well, I do not think any one of these men is in favor of trucking, from my talks with them.
Q. Haven't they actually expressed themselves to you as being opposed to trucking?
A. I think Mr. Holway is opposed to trucking. I think Mr. Alcorn is.
Q. And Mr. W. W. Campbell?
A. I am not so sure about that one, Mr. MacIntyre.
Q. Well, why do you think that they are opposed?
32596 A. Well, that is an impression that I have from—
Q. From your conversations with them?
A. From my conversations I had with those men. I cannot recall any definite exact statement.
32604 Q. Calling your attention to Respondents' Exhibit 2333-H, J, and L, is the rubber stamp that was used in making the impressions on those three sheets of

paper, and over which you filled in information about basing-point prices and freight rates—a rubber stamp such as you use in your office generally for such purposes?

A. Now, Mr. MacIntyre, I have not at any time said that we use basing-point prices, and you know that.

Q. Well, then—

32605 A. The stamp that is here—

Q. Is that one you generally use?

A. —is a stamp that we generally use, yes.

Q. For the purpose it was used in that instance?

A. To fill in this pricing estimate, yes.

Q. That you use generally in your business?

A. That is right.

Q. And it carries the names of what basing points?

A. I don't know that there are any basing points on here, Mr. MacIntyre.

By Mr. MacIntyre:

Q. They are not very distinct so that is one reason I am attempting to have you give it to us for the transcript.

32606 A. Well, the use of a stamp does not require any basing points on there at all.

Q. The stamp, itself, though, does carry "Universal," doesn't it?

A. Well, I can't—I can't even read it.

Q. Do you then see—do you have glasses?

A. I don't have them with me. You can read them.

Q. Well—

A. If you will say it is "Universal" I will take your word for it—

Q. I would like to have you decipher it for us, while you are here, though. I will try to get one of the clearest that I can find.

Well, looking at the one in the upper left corner of Respondents' Exhibit 2333-J, will you please give me the names, if you can read them, of these basing points appearing there in the rubber stamp (indicating).

A. Well, the first one is "Universal," and the second one I can't read.

Q. Isn't that Buffington?

A. It might be.

Q. Well, doesn't it, upon closer examination, appear to be Buffington?

A. It is a "B" to start with. The next one is "Mit-

chell"; the next one is "Wyandotte", and then the
32607 "East," and below that is our mill price.

Q. In the first column opposite these basing point names, what is to be included, and what is included?

A. It looks like cloth and paper, and—

Q. You have the word "base" under it; isn't that so?

A. I don't (witness examining)—"base" and "rate"—that is what it is here.

Q. "Base,"—and the next column is "Rate"?

A. Yes, and then it says "Cloth" and "Paper."

Q. On direct examination you told Mr. Withrow that in the picking up of quotations from the field by your salesmen you quickly learned as to the level of prices generally, and you followed the prices that you thus picked up.

Do you mean to tell us by that that picking up of a price at Zanesville, Ohio, and another one at Steubenville, Ohio, with both of them, for example, $2.30, would lead you to believe that the present level of $2.30 is a level that is followed, and that you then proceeded to follow it?

A. I don't think I said that.

Q. Well, I want to get your answer cleared up on it. What do you mean by "price level" in that connection?

A. I think "price level" defines itself. It is the range of prices.

Q. It is the level of the price to which you figure back, isn't it, after picking up these prices in Steubenville
32608 and Zanesville?

A. I would like to explain that to you, Mr. MacIntyre. Throughout that—throughout all the area where we sell I find prices exist. Now, when I find that they are reflected by the quotations from different centers which are called bases, and if the prices in a given area go up, they usually go up from one level to another level.

Q. At the base?

A. Well, at the destinations. No; the prices go. They move from one level up.

Q. Not at all destinations, do they?

Mr. Withrow: I think the witness ought to be entitled to answer the question. He has been repeatedly interrupted.

Trial Examiner Norwood: Have you completed your answer?

The Witness: Yes, I think that is clear, Your Honor.

Trial Examiner Norwood: Go ahead.

By Mr. MacIntyre:

Q. Well, if an advance of the basing-point figure of 10 cents occurs, that does not mean that the price is advanced 10 cents at all destinations, does it, that are controlled by that base?

A. I believe that destinations which reflect back
32609 to that base would be uniformly affected, yes. That is, to my mind, what makes up a base.

Q. Well, isn't it a fact that the changes in the base in that manner causes the territory to be shrunk to a degree unless all other bases react in the same manner; therefore, your prices would not vary to the same degree within a territory of the base after the rise control than before the rise control?

A. I think I know what you are trying to get at. If the Cleveland base were dropped to 50 cents lower, it would affect a tremendous area.

Q. Yes. So all the area it would affect in that instance would not be by 50 cents a barrel, would it?

A. Well, I suppose it would—no, I do not think it would.

Q. It would be by different amounts in some parts of the territory?

A. Oh, yes. The price reaches a point where it would taper.

Q. So when you use "price levels," then, you are really referring to the difference in the level of the basing-point figure from one to the other point?

A. No, Mr. MacIntyre, I do not want you to make me say that, because that is not what is in my mind.

Q. What is in your mind?

A. It is the destination prices that make the level, and if there is a destination price—those prices are in a dozen or fifteen or twenty towns close by, and if one of
32610 them moves, and the others move in the same proportion, I say that there is one level that is moved to another level.

Q. In part of the territory, at least; but I just understood you to say it did not necessarily move for the full—

A. Part of the territory in which we ship; that is right, Mr. MacIntyre.

32613 Q. Well, now, we will come more or less to the central—the things that these preliminary questions were asked for:

Who in your organization gave more time to freight

rates when you did not get The Cement Institute freight rate book than they give now?

A. Mr. Brundage and his assistant, who was at that time Buffman, who is now Emch, and the three women in his office.

Q. But their duties have been the same in all important particulars?

A. Well, Mr. MacIntyre (laughing)—

Q. They do not work overtime any more than they did when you came with the company, do they?

A. No, they do not work overtime. When I came there I found them reprinting these sheets, and that is a
32614 job that they were at constantly, and it seemed they were constantly behind with it. Now that we are using Institute freight rate books alone we do not have that time wasted.

Q. And what do they put their time to?

A. The regular work, Mr. MacIntyre, the writing of letters, doing regular routine, placing files, and they are busy all the time.

Q. Your business is not any larger than it was when you came with the company?

A. Well, as a matter of fact, it is.

Q. Well, the records that you put in here show that your sales for the last two years were smaller than they were for the two preceding years.

A. Mr. MacIntyre, that is not what I said. I said that in 1936 it showed an increase. In 1937 it showed another increase over 1936; and in 1938 a decrease over 1937; and in 1939 an increase over 1938. And that was very plainly said the first time I said it.

Q. Can you supply us with the number of man-hours that you put on freight rates the first period that you were with the company before you got the Institute books and the number of man-hours that you put on it since for the purpose of including in the record here in an effort to appraise the testimony you have given as to the amount of time that you have expended?

A. We have kept no such record as that.

32615 Q. It is just an opinion of yours, then?

A. It is a thing I know. It is a fact. I saw these people doing the work.

Q. Well, calling your attention to Respondents' Exhibit 2339-A, B, and C, in the figuring of freight rates by a Mr.

Brundage and others in your organization at the time they made this up, they figured freight rates from any number of basing points of your competitors to quite a number of destinations, didn't they? Isn't that what that exhibit shows?

A. Yes, I think they figured rates from different basing points.

Q. That was not necessary to determine the freight rates for your shipping purposes, was it?

A. Those were what we used to quote prices with.

Q. Yes. I am talking about shipping purposes now, figuring freight rates from your competitors' basing points to all destinations. It was not necessary for the purpose of figuring your shipping rates, was it?

A. The shipping rates are in the first column.

Q. Just one column out of the whole book.

A. That is right.

Q. So when you say they took a lot of time in making up these books, such as Respondents' Exhibit 2339, you meant that they were taking up considerable time in figuring freight rates for pricing purposes from your 32616 competitors' basing points; isn't that correct?

A. Well, they were figuring freight rates to put on that sheet.

Q. Which figures included freight rates from basing points of competitors?

A. They were converting them from another form to the form on that sheet; that is what they were doing.

Q. Well, can't you answer my question, if they were not figuring freight rates for pricing purposes from basing points of your competitors?

A. That is right.

Q. And they were taking up their time with doing that when you say they took up considerable time in making up their freight rate books; isn't that correct?

A. Yes, I guess that is right, Mr. MacIntyre.

Q. And so, instead of doing it in your office and taking up their time in figuring freight rates from basing points of your competitors, you now buy that service from The Cement Institute; isn't that correct?

A. We have always had, ever since I have been there, access to the—

Mr. MacIntyre: Now, if Your Honor please, I object to the witness making a speech. I want an answer to that question.

Trial Examiner Norwood: I think he can answer
32617 in his own way, provided he answers it.

Read the question.

(Last question read.)

A. No.

Trial Examiner Norwood: Is that true or not? Did you answer it?

The Witness: My answer is "No."

By Mr. MacIntyre:

Q. In this service that you get from The Cement Institute, and for which you pay money, you get books that contain a showing of freight rates from basing points of your competitors, don't you?

A. Those books show freight rates from basing points from our own station to many destinations.

32618 Q. Freight rates from basing points of your competitors to many destinations, don't they? Don't they show that?

A. They show—I do not know whether there are competitors' basing points or not, Mr. MacIntyre: They are not identified as basing points of competitors. They show rates from stations.

Q. And you know those to be basing points of your competitors?

A. I assume they are basing points. I do not know if they are.

Q. In your experience you assume that they are basing points; is that correct?

Can't you answer that?

A. I assume they are basing points, yes.

Q. And your assumption is based on your experience, isn't it?

A. That is right.

Q. And the service that you are thus buying replaces the service that you had formerly rendered, yourself, in your office; isn't that correct?

A. Mr. MacIntyre (laughing), that does not reflect what the condition is. We quit making those freight rate books and used these Institute books instead of them.

Q. Yes. Well, I think that answers the question now.

32619 You spoke on direct examination about getting freight rates and routing information for bill-of-

lading purposes from freight rate agents of the railroads. Do you recall that testimony?

A. From freight agents—

Q. Of railroads.

A. Of railroads?

Q. Yes.

A. That is right.

Q. Do you get from them also freight rate information and routing information from the locations of your competitors' mills to various destinations, as a general routine?

A. No.

Q. Do you get it except casually and as a matter of curiosity?

A. I do not know that we get it at all, Mr. MacIntyre.

Q. You told Mr. Withrow that you secure all the business in the towns near your mill. How do you know that?

A. Well, I believe we get it all, Mr. MacIntyre.

Q. Well, you did not state your belief; you stated a positive answer to him, that you got it all. Do you want to qualify that to the statement you now make, that you believe you get it all?

A. Well, I believe we get it all.

Q. Well, you want to qualify any testimony you
32620 have given heretofore to conform to the present answer, that you believe you get it all; is that correct?

A. It doesn't make much difference. You write that in any way you want it, Mr. MacIntyre.

Q. You would rather have it as "believe" than as a positive statement that you do get it all?

A. (Laughing.) Picayunish; picayunish.

I said we get it all, and I said I believe we get it all

Q. Well, do you want to stand by the testimony you have given, to the effect that you do get it all?

A. I will stand by both statements.

Q. How do you know you do get it all, since you desire to stand by the statement you have given?

A. Well, common sense. They are little bits of towns. They don't use much cement. They are neighbors of ours. Most of them either work for us, or work for companies that are interested in our company.

Q. You sell all the cement that is sold in New Wilmington, Pa.?

A. Oh, that is not near our plant.

Q. What do you mean by "near"?

A. I mean the few little towns that are within three or four or five miles; the small boroughs that are close to Bessemer.

32621 Q. Do you sell all the cement within 10 miles of your plant?

A. No, I do not think we do, if you make it 10 miles.

Q. So the answer you gave to Mr. Withrow applied only to within almost sight of the top of your mill, three or four miles?

A. Well, you are quibbling about a picayune question. New Castle is 11 or 12 miles away. We do not sell all the cement in New Castle.

Q. You do not sell all the cement within eight or ten miles of your plant, do you?

A. Well, a little borough near us is Mt. Jackson, and we sell all the cement that goes in there, and that is between us and New Castle.

Q. How far is that from the mill door?

A. Oh, four or five miles.

Q. How do you know you sell all the cement that goes in there?

A. Mr. MacIntyre, just plain common sense. There is one fellow that handles cement there. People that want it will go to him and get it. He handles our brand.

Q. You do not know whether or not they bring cement in for themselves from some other locations?

A. They might. I don't know.

Q. I am just trying to test the statements that you made?

A. Well, possibly by extending your imagination
32622 to the ultimate, may be they do get a few bags of some other brand.

Q. You do not know.

Well, there is considerable cement in addition to yours sold in Youngstown, isn't it? Isn't that a fact?

A. Yes.

Q. Many brands?

A. Yes.

Q. From distances. Lehigh cement is sold in Youngstown, isn't it?

A. Lehigh is in New Castle, a few miles nearer, yes.

Q. Standard Portland Cement is sold in Youngstown?

A. It is.

Q. Medusa?

A. It is. Medusa is nearer.

Q. Columbia brand of the Pittsburgh Plate Glass Company sold in Youngstown?

A. That is right.

Q. And you sell cement in Zanesville?

A. We do.

Q. And you do not sell below their prices when you sell there?

Mr. Withrow: Sell where?

Mr. MacIntyre: In Zanesville or Youngstown.

A. I do not believe we sell below their prices, Mr. MacIntyre.

32623 By Mr. MacIntyre:

Q. That is, in either place?

A. I do not believe so.

Q. And they do not sell below yours in Zanesville?

A. I don't know it if they do.

Q. At line 22, page 32097, you testified that you knew that dealers were well informed as to prices in the cement industry. How do you know that, Mr. Warren?

A. Mr. MacIntyre, just by plain common sense judgment. I have talked with a great many dealers. They are high-grade people, generally speaking, good business men. They are well informed as to their businesses.

Q. Let us see how well they are informed.

Do they know what basing points in the cement industry are used as figuring points?

A. I never talked about basing points. I do not recall talking about basing points to them.

Q. You do not know how much they know about that?

A. I do not. I do not think that that would be important to being well informed about their business.

Q. They buy cement, though, don't they?

A. Yes.

Q. How many dealers can you name now that have any information at all as to the mill nets that you have realized, as shown by Respondents' Exhibits 2341

32624 and 2343 on cement that you sold to dealers?

A. Shown on here, Mr. MacIntyre?

Q. Well, we figured it out yesterday, according to your testimony, as to what your mill nets are from the two pages. I think you agreed that the two papers, when taken together, and the information is considered, do show your mill nets, approximately.

A. Mr. MacIntyre, I never talked about any of these figures with any dealer.

Q. You do not know any dealer that knows about those figures, do you?

A. I have not talked to them about them.

Q. Well, do you know anyone that does know about them?

A. How do I know if anyone knows about them if I have not talked to them about them?

Q. I am just trying—

Trial Examiner Norwood: Answer whether you know.

32625 The Witness: Your Honor, I wouldn't know whether they know.

Trial Examiner Norwood: Listen, it is much easier to make a direct answer, state whether you know or not, than to go the roundabout way and explain why you do not know. You do not have to give any reason for not knowing.

Mr. Withrow: Your Honor, I would like to point out that this entire line is misleading. On record page 32097 the witness is asked whether they are well or poorly informed as to the matter of prices quoted on cement; nothing about basing points or bases or mill nets, or anything else. This whole cross-examination for the last five or ten minutes has been misleading, and it has not gone to the direct examination at all, and has no bearing on the issues whatsoever.

I move to strike it out.

Trial Examiner Norwood: Go ahead.

Mr. Withrow: The motion is denied?

Trial Examiner Norwood: If there was a motion.

Mr Withrow: I moved to strike the testimony

Trial Examiner Norwood: Yes. Motion denied.

By Mr MacIntyre:

Q. Yesterday you stated that freight rates on bills-of-lading as placed on there by railroad freight agents are checked.

Can you tell us now by whom they are checked
32626 and against whom they are checked—against what they are checked and for what purpose?

A. We check them—make this clear: The freight agent puts the rate on the bill of lading; we check that to see if it is right.

Q. With what?

A. Against the rate book that's furnished to us by The Cement Institute, and we know that that rate will also be checked by the delivery agent of that railroad company, and it will also be checked by the auditor of the originating and delivering railroad, and then, periodically, we take all of our freight sheets and submit them to the Traffic Bureau of the Youngstown Chamber of Commerce for further checks to see if there are errors.

Q. Well, until you check the rate that the freight agent has put on that bill-of-lading, with The Cement Institute freight rate book rate, you don't know, then—that is, which one is the lower, do you?

A. (Witness laughs.)

Q. If either one is lower than the other?

A. We couldn't tell until we saw them both which one was lower, Mr. MacIntyre.

Q. Well, until you see them you don't know whether or not that the railroad company has a freight rate that is lower than that appearing in The Cement Insti-
32627 tute rate book for a shipment between two given points? You wouldn't know until you compared them, would you?

A. Why—ha, ha—I don't conceive any way we could find that out until we had them side by side and compared them.

Redirect Examination by Mr. Withrow.

Q. Now, Mr. Warren, when you make a sale in Cleveland, or quote a price in Cleveland, do you go through any calculation or computation to arrive at that price?

A. No.

32628 HARRY C. KOCH, called as a witness for the Respondents, being first duly sworn, testified:

Examination by Mr. Brick.

I am at the present time vice president in charge
32629 of sales with Lone Star. I was first connected with the cement business sometime around June, 1905; my previous business experience consisted of ten years in railroad service. In 1905 I was affiliated with what was then known as the Kansas Portland Cement Company.

office at Iola, Kansas, and plant at Concreto, Kansas, which was known as Sunflower Brands. I started with them as assistant sales manager and assistant traffic manager and was there until about the first of November, 1907. My next employment with a cement company was when I left Iola, Kansas to go to Chattanooga, Tennessee
32630 to open a sales office for a new plant. That was the plant at Richard City. South Pittsburgh was the original address and changed to Richard City for the plant. I remained with the Dixie Portland Cement Company until late December 1909, and as my next connection, I was transferred to Kansas City, Missouri to handle the sales of the Iola Portland Cement Company. I was sales manager at Chattanooga and at Kansas City. I remained sales manager of that company until February or March 1917. In July of that year I connected up with the Old Mission Portland Cement Company, office at San Francisco, plant at San Juan Batista, in the capacity of sales manager and I remained there until late Octo-
32631 ber 1919. My next connection was as sales manager with the Texas Portland at Dallas, Texas, starting immediately upon my arrival at Dallas. I was there until late December of 1922 or the first of the year 1923, and I was called into the New York office of International as general sales manager. International later became Lone Star. I became vice president of Lone Star about the last of 1925 or the first of 1926. I am not a director of Lone Star and have no connection whatsoever with any other cement company.

Q. Now, you spoke of your early connection about 1905 with the mill at Kansas City, and that was in connection with the sale of the Sunflower Brand, was it not?

A. The mill was at Concreto, Kansas.

Q. Yes.

32632 A. That's right.

Q. And was that mill a basing point while you were operating in that territory?

A. Yes, it was a basing point, and we used other bases, also.

Q. Do you know under what circumstances it became a base mill?

A. Well, at first it was not a base mill; it was a new departure from what had been known in the industry, the

two mills located in that vicinity were the first to operate on natural gas.

Q. Did it become a base mill while you were with the company?

A. It had become a base mill then.

Q. Now, in connection with the plant at Richard City of the Dixie Portland Cement Company, was that a base while you were operating with the—

A. I started off its first shipments.

Q. —Dixie Portland Cement Company—

A. Using a base at that point, as well as other bases.

Q. And how about the mills of the Iola Company?

A. The Iola Company was a base when I returned to it in—or when I took charge of sales in 1909.

Mr. Brick: With Your Honor's permission, I won't repeat any dates at this time, because I think that the
32633 time has been sufficiently fixed, by his statement concerning his connections with these companies.

Is that agreeable, Mr. Wooden?

Mr. Wooden: I think it is quite complete.

Trial Examiner Norwood: All right.

Mr. Wooden: And adequate, as far as I am concerned.

By Mr. Brick:

Q. Now, was the plant of the Old Mission Company at San Francisco a base mill?

A. It was a mill that was building when I started with them, but when we began shipments and quoting prices, yes, it was a base point; that is, we used a mill base, and had other basing points as well to compute our delivered prices.

Q. And those other points, I assume, were mills located in the San Francisco district?

A. Some of them were and some of them were not. They had what was known as common points, which meant the same rate applied from what later has become known as the Kansas Gas Belt. There were such points as San Jose, Stockton, Sacramento, and when the mills on the Pacific Coast were built, and their product began to meet public approval, they established bases at those common points, and computed prices based from that point just as if there was a source of supply for production at those points; therefore, the San Francisco section at that time had every mill a basing point, and the common
32634 points that I have just enumerated as a basing point.

and the San Francisco, a port of entry, as a common point, or as a basing point.

Q. Now, when you were connected with the Texas Company, was it the Dallas mill that was a basing point?

A. The Dallas mill was a basing point.

Q. And how about the mill at Houston?

A. The mill at Houston was not a basing point for about two or three years after it was built. It was the first plant, so far as I know, in the world, that was built to get its lime content out of oyster shells, therefore, it was more or less in the nature of an experiment, and the management didn't know what it cost them, what the mill was going to cost them, but the mill was made a basing point along about 1920 or 1921.

Q. That Houston mill was owned by the Texas Company, was it not?

A. It was owned then by the Texas Portland, and built by them.

Q. Now, when you went with the International Company in 1922 at New York, were the mills which that company operated at that time basing-point mills?

A. Yes, they only had one, just acquired shortly before I reached there, the one in Hudson, N. Y.

Q. And what was the status of the mills which were subsequently acquired by the International Company?

A. Those acquired by us which were not
32635 basing points—we made them basing points, and if they were built by us we immediately made them basing points.

Q. Now, that applies to Bonner Springs, Kansas, does it not?

A. That applies to Bonner Springs, Kansas.

Q. And Limedale, Ind.?

A. Limedale, Ind.; that is right.

Q. Had they been bases prior to their acquisition by the International?

A. Neither one.

Q. But International made them basing points?

A. Correct.

Q. And how about the plant at Birmingham which International acquired?

A. It was a basing point.

Q. And how about Spocari?

A. Spocari was not; we made it a basing point when we purchased it.

Q. Now, what did you do with respect to the Norfolk plant?

A. When the Norfolk plant was built and completed, in operation, we made it a basing point.

Q. And how about New Orleans?

A. The same at New Orleans, that is, when we built that plant and completed it we made it a basing point.

Q. And then you acquired, subsequent to 1922, I understand, the mill which you now have at Nazareth?

32636 A. That is right, Nazareth, Pa.

Q. What is the status of that mill?

A. Well, we made a basing point of that mill, it was right in the Lehigh Valley group, so it didn't affect much.

Q. Now, Mr. Koch, you have mentioned various mills which you made basing points in the course of your connection with various cement producers.

Will you state the general reasons for having made such mills basing points?

A. Well, our first principal reason, of course, was to be selfish, to exclude, so far as we could, competition from the area which we could serve to advantage, rate-wise speaking. At the same time we did that, it naturally lowered the price to the buyer, the user of cement, in the area so affected.

Q. You have mentioned that by putting in basing points you had an effect on competition around the area of your mill. Will you explain just what that effect was?

32637 A. Well, might I make this statement? It naturally would depend upon the base that we put in; it is very obvious that you cannot pay freight from a distance and equal the nearest plant without a great absorption.

By Mr. Brick:

Q. Did you find that after putting in basing points that you had more or less competitors trying to sell cement in the area around your plant where you might have had the benefit of the better freight rate than any of your competitors?

A. Well, at first—it follows that those that had been serving the market, or enjoying part of it, would try to remain. It takes a period of time, but our experience was that naturally the competition at those points dwindled down.

Q. Did it dwindle, Mr. Koch, in the sense that there were fewer people selling in that area?

A. Oh, yes, very materially, and those that were selling were not nearly as active.

32638 Q. Now, when you put in the base at your mill at Bonner Springs, was there any reduction in price in some of the marketing areas adjacent to that mill?

A. Yes, that probably reduced the Kansas City market, and some nearby markets, all the way from one to fifteen cents a barrel.

Q. You mentioned the Kansas City market. Would the reduction have covered a fairly large area, or just one or two points?

A. Well, mile-wise, I wouldn't consider it a large area. Tonnage-wise, yes.

Q. Well, was the effect of putting in the base to reduce the delivered price at several points, or only a few points?

A. Well, in that case it reduced it at quite a number of points.

Q. Now, do you happen to recall that in connection with the base put in at the Linædale plant, any particular point, for instance, Terre Haute, Indianapolis, or any of those points?

A. Oh, yes, it affected, I would say, a territory in Terre Haute, Indianapolis—that would be 40 miles one way and 45 the other, and perhaps forty or fifty miles to the north,—it was affected by being lowered from one to fifteen cents a barrel.

Q. Now, then, without taking up each of these mills individually, will you make a general statement concerning the limits of the various reductions which were affected by putting in these bases?

32639 A. All right.

At Norfolk, I don't just recall what the price was, but properly based I would say it made a change in Norfolk of 35 to 40 cents per barrel.

Trial Examiner Norwood: That is, the price was that much less?

The Witness: Lowered that much.

Trial Examiner Norwood: Yes.

The Witness: In the case of New Orleans, properly based, the price would be down, oh, 45 to 50 cents.

In the case of Houston, the price was down about
32640 35 cents; that means the prevailing prices were lowered to that extent.

By Mr. Brick:

Q. Yes, sir.

A. It wouldn't affect anything around Nazareth, I believe a few points from one to perhaps ten cents, and I gave you Bonner and Limedale, I believe.

Q. Now, prior to the time that Lone Star put in—

A. (Interposing.) Oh, there was one more there, it did reduce a large area, not so large in consumption at that time, around the Spocari mill, too.

Q. Yes.

Prior to the time, Mr. Koch, that you put in a base at the New Orleans mill, how many competitors were seeking business in that Louisiana area?

A. Well, ten to a dozen.

Q. And after you put in the base, how many competitors were seeking business in that area?

A. I don't believe there were over two or three.

Q. Now, what caused the decrease in the number of producers seeking business in that area?

32641 A. Not as good as a service you could render being right there in that part of the town.

Q. And did the price have anything to do with it?

A. Oh, yes, entirely—well, I say entirely; service helps some, but price and service.

Q. Now, would you say that the decline in the number of competitors seeking business in the area of the New Orleans plant is more or less typical with respect to other plants where you put in bases?

A. Well, Mr. Brick, they come up just as close as they can. When you say "area," of course, there gets to be common ground outside, where they are still quite active, but I was thinking primarily of New Orleans itself, and what relates to that is quite well illustrated in our Norfolk instance, which later is carried on up into your noble capital here.

Q. When you found, Mr. Koch, that there was a decline in the number of competitors seeking business in such territory, did you find that there was any difference with respect to the activity of the competitors who remained in the territory?

A. Oh, yes.

Q. That is, with competitors of your company?

A. Oh, yes, they are not nearly as active.

Q. Mr. Koch, does each of the Lone Star mills have a sales territory?

A. Yes, we divided it up by divisions, because
32642 of our peculiar—our sales and manufacturing set-up.

The witness identified Resp. Ex. 2348 as a clear type map of the United States, showing in colors, as properly labeled, about the areas which Lone Star travels regularly by its different divisions. The divisions are named with respect to the names which Lone Star used in its office, for instance, Texas Division, Kansas Division and so forth. The small subdivisions or light portions of the map like Colorado represent territory in which Lone Star does not travel. It is marked as a county outline map.
32643 The subdivisions within these various states, regardless of Lone Star's sales territory, are the counties. That is what the map says as it came from the map maker.

32644 Mr. Wooden: No objection.

Trial Examiner Norwood: Received as marked.
32645 (RESP. EX. 2348, was offered and received in evidence.)

By Mr. Brick:

Q. These various areas, Mr. Koch, they surround certain individual mills of the Lone Star Company, do they not?

A. Well, either individual mills, Mr. Brick, or, in the case of Alabama, we operate two in that division; and in the case of Texas we operate two in that division.

Q. Now, are sales made outside of the territories included on the map?

A. Oh, yes.

Q. And will you explain under what circumstances?

32646 A. Well, either a question of color, quality, or some friendly buyer that we serve quite regularly that happens to secure work in the section which we do not regularly solicit.

By Mr. Brick:

Q. And are you making reference only to your manufacture and sale of standard Portland cement?

A. Well, no. I really incorporated there a high early. However, the light-colored cement might be considered a normal Portland cement. It differs in color slightly, that is all.

Q. Do you solicit orders in the entire areas indicated; that is, in all of the various areas indicated on the map?

A. Yes; by salesmen in the field.

Q. And do those salesmen cover in the aggregate all of the territory in each division?

A. Yes.

Q. Suppose you have a market condition which causes you to obtain a very low mill net with regard to the sales made on the fringe of any of these various divisions, do you solicit that business irrespective of the—

A. Yes, we solicit that business generally down to what we set as a minimum. By a minimum I mean the
32647 net realized to us at the mill.

Q. Have you ever had any cases where it was necessary to withdraw from sales territory?

A. Oh, yes.

Q. Can you give any examples?

A. Oh, we used to travel parts of Michigan. We withdrew from that. Wisconsin, certain parts of Iowa, Minnesota, North and South Dakota, part of Florida, southern part.

Q. Are these typical examples of the situations which occur from time to time?

A. Are they what, Mr. Brick?

Q. Are they typical examples of the situations to which you have referred with respect to withdrawing from various territories?

A. Oh, yes. Oh, yes.

Q. And what are the factors, Mr. Koch, which lead you to withdraw from the territory, as you have described?

A. Well, we do not like to waste any more money than we have to in our sales effort. If you spend your money in your sales effort, even after you acquire, or should acquire, any of that business, it does not give you any profit returns.

Q. Has it been your experience that it is difficult to re-establish yourself in a territory in which you have stopped soliciting at some time or other?

A. Yes. Unfortunately, we have withdrawn from
32648 some territories and re-entered them. My experience is that when you come in again you probably got a harder task than if you were new on the market, because the buyer generally feels that you deserted him when the business did not suit you, and, therefore, he should not give it to you just because you are coming back.

Q. Does reestablishing of your brands in the territory where you have previously sold mean an expenditure of a small or a considerable amount of sales expense?

A. Oh, very much more, both to reestablish the brand and get the customer's good will,—the buyer's good will; he is not a customer yet.

Q. Will you sum up the factors, Mr. Koch, that determine the territory in which the Lone Star Company solicits business?

A. Generally speaking, the territories are divided for solicitation on a rate basis, service considered. There might be a few slight exceptions. However, the one company solicits for its product, and if unable to sell it, because of color or some other fancied grievance on the part of the buyer, they will take the order and ship it from another mill to please the buyer, even though it moves into the territory of some mill,—some one of our mills closer by rate-wise.

Q. Are you able to observe from your experience the distance at which your competitors make sales from time to time?

A. By that distance you mean from their mills?

32649 Q. Yes, sir; to the point of delivery.

A. Well, I always have the feeling, based on my observation and experience, that there are a great many of our competitors that will go out lower on the net realized to cover a territory, or what we may sometimes call "tonnage hounds," by comparison more so than we do. That is about the best I can state on that, Mr. Brick.

Q. Now, just for the purpose of seeing if I understand you correctly, so far as the comparison is concerned, then, the Lone Star Company, as a matter of policy, does not reach out for business as much as many of your competitors do. Is that the gist of the statement you made, Mr. Koch?

A. That is a fair statement.

Q. Now, before your connection with the Lone Star, what was your experience with regard to the price basis on which cement was sold?

A. Well, I never had any experience at selling f. o. b. mill; that is, any selling that I ever did was all f. o. b. destination, with the slight exceptions of railroad, Government, and now and then a little trucking business.

Q. I see.

A. Maybe I should not have said "a little trucking business"; some trucking business.

Q. Since the time you have been in the cement business, 1905, the companies with which you have been con-
32650 nected have always sold at delivered prices?

A. Oh, yes.

Q. Now, you mentioned having become sales manager of the Dixie Portland Cement Company and having charge of the sales from the time that the mill at Richard City went into operation.

A. That is right.

Q. What was the condition in the sales territory where that mill sought sales as to sales f.o.b. mill or f.o.b. delivery point?

A. Well, I found a condition to the East, the Carolinas, and into Georgia, down into Alabama, Tennessee, where the trade was being quoted a price sometimes by the Lehigh Valley with an estimated freight to the destination; sometimes the quotations were made f.o.b. Fordwick with an estimated freight rate to destination; other times the prices were quoted f.o.b. car Charleston on arrival of the steamer—I might say Charleston-Savannah, and another price f.o.b. warehouse Charleston-Savannah, after the steamer is unloaded; and again there either would be given an estimated freight rate per hundred, or no reference made to it whatsoever.

That condition applied, I would say, over toward Mississippi. As you came over toward the State of Mississippi and Louisiana you began to find f.o.b. destination prices, coming down from the Kansas field and the Missouri field.

32651 Trial Examiner Norwood: Well, what is this time you are talking about?

The Witness: That is 1907-08.

By Mr. Brick:

Q. Did you find at that time, Mr. Koch, that Lehigh Valley mills were shipping into the sales territory around Chattanooga?

A. Oh, Yes.

Q. And how did those mills quote?

Mr. MacIntyre: What is the time on these, now?

Mr. Brick: It has been stated—

The Witness: 1907-08.

Mr. Brick: Just to make the record clear, I am trying to direct the witness' attention to the situation exising in the Southeast of 1907, when the Chattanooga and Richard City mill went into operation.

The Witness: Yes, cements were shipped in there from the Lehigh Valley, shipped in there from Indiana, shipped in from St. Louis.

By Mr. Brick:

Q. And on what kind of a price was the cement sold which came from the Lehigh Valley?

A. Sold on a mill price in the Lehigh Valley with an estimated freight rate.

Q. Was that a common practice of the Lehigh Valley mills at that time, or was that merely a practice
32652 which was followed occasionally?

A. I have no definite knowledge of what they were doing in the East. I had not been in that territory. But from what I learned in coming in contact with those cements from the Virginia line on down, that was a common practice, through distributors or direct from mills.

Q. As far as your experience was concerned, Mr. Koch, did you find that it was a uniform practice for Lehigh Valley cement to be sold on a basis of a quotation showing the freight rate, or was that merely an occasional practice?

A. No. There was, generally speaking, yes.

Q. Now, in connection with the various brands being sold in that area—we are still talking about the area of the Richard City mill—

A. All right.

Q. —regardless of the method of price on which the various brands were sold, did you find that they were sold direct to dealers or through distributors?

A. There were a mills that I believe—that is, what I mean by that, there were a few producers of cement that quoted to the dealer. Most of them were—most of the business, however, was sold through the medium of a distributor plus a subdistributor.

Q. Will you explain that a little more, please?

A. I will attempt it.

32653 Assuming that a plant like the Phoenix Portland in the Lehigh Valley had an arrangement with the William G. Hartranft Company to sell the output of that plant, located at Nazareth, the William G. Hart-

Cement Company, as distributors, or sales agents, whatever you would term them, for this Phoenix plant, would enter into a sub-arrangement for the States of North Carolina, South Carolina, Georgia, Alabama, and perhaps Tennessee, with a big distributing house at Charleston, S. C.; namely, the Carolina Portland Cement Company.

A. A plant like Allentown, or—there was a plant up on the Hudson River—I have forgotten the name now—but well, there was another plant in West Virginia, Buckhorn, they would make a similar arrangement, we will say, through the Samuel French Company of Philadelphia, and Samuel French, in turn, would make a sub-arrangement with the Southern Lime & Cement Company at Charleston.

Q. And did these subdistributors have various areas in which they confined their sales of the particular brands?

A. Yes. They generally handle several brands in trying to get control of the whole thing, if they could.

Q. Well, now, you have mentioned sales through distributors to dealers, and sales through distributors and subdistributors to dealers.

A. Yes.

3265 Q. Did you find that there were direct sales in any cases by any of the companies to dealers?

A. Oh, yes. Oh, yes, there were some plants that were quoting direct to dealers without going through the distributor.

Q. Now, we have been discussing the situation as existed in the Southeast in 1907.

Now, when did the Richard City plant of the Dixie Portland Cement Company go into operation?

A. We went into operation, I think, late in 1907. As I recall, there was a panic on, but I think we made our first shipments in February, 1908.

Q. Now, on what basis did you sell the product of that plant?

A. I immediately began selling f.o.b. destination, and put out my quotations accordingly.

Q. Now, that, then, was a new method in that particular area, was it not?

A. It was.

Q. And what did your competitors do?

A. Well, they hung on to their method as long as they could. Gradually the f.o.b. destination became the method generally pursued.

Q. Now, what reasons did you have in mind, Mr. Koch, at the time you decided to sell the product of the Richard City plant on a delivered-price basis?

32655 A. Well, I always felt that the customer was interested in what the cement was going to cost him where he was going to use it. On the other hand, I wanted him to know what my price was there, and I wanted him to use my price to compare with the other man's price. It was quite obvious that if the average buyer knows—and if he did not know what the other man's stuff cost, and he went to a lot of trouble to find out—that he would be happy to take mine, because I guarantee the cost to him delivered to his point.

Q. Prior to the time you took charge of the sales with respect to the Richard City mill, you had experience in the West—

A. Yes.

Q. —with respect to selling at delivered prices, did you not?

A. That is right.

Q. Did you find that your experience with delivered prices in the West was favorable?

A. Oh, very, very.

Q. And what reaction did you find from the dealers with respect to the delivered price initiated by you in the Southeast?

A. Well, I felt I met with a very favorable reaction; in fact, with our method, our sales method, so that that plant later on became quite a profitable property.

Q. At that time, Mr. Koch—I am referring to the period around 1907, when companies began to fol-

32656 low your company in quoting delivered prices, what did you find with respect to the various prices as to a similarity or variation which were quoted for a particular point?

A. Well, naturally, they become more or less uniform as the other fellow followed that lead and there were no really large manufacturers down there. I am thinking now that the quoted prices are what he actually got for them; I have no means of telling.

Q. Was it your experience that the prices quoted by the various companies soliciting business in that area were uniform for particular points?

A. On open quotations, and I naturally assume that

they came close to the price that we were accepting for our article, but I have no way of telling just what they actually got for it.

Q. When you were with the Iola Company, were your mill nets the same on all sales?

A. Were our what?

Q. Mill nets.

A. Oh, no, couldn't be.

Q. In other words, you shipped into territory where prices were established by competition?

A. That's correct.

32657 Q. At that time, Mr. Koch, did you find that with respect to mill nets the general situation was very much the same as that of the Lone Star mills at the present time?

A. No difference at all other than the distances between mills.

32658 Q. In these areas, Mr. Koch, were you able to sell at a price higher than you found your competitors quoting?

A. No.

Q. Now, does that apply to the areas where you were selling in the West, and also the Southeast?

A. Well, there might have been some exceptions in the early days when specifications were not very regular, as they are today.

Q. Now, did you personally have any experience in selling cement to distributors?

A. I did out in the Kansas and Nebraska, Oklahoma, and the area we served from there, yes.

Q. And to whom did these distributors sell?

A. They sold to dealers and to consumers.

Q. Do you know on what price basis distributors sold to the dealers?

32659 A. Oh, yes.

Q. What was it?

A. They had to sell on a delivered price basis, because we gave them that, or they could figure it by the same method that we used.

Q. How did you find the method of selling through distributors worked out?

A. Well, it was not satisfactory.

Q. In what respects?

A. Well, the distributor, as we had him out there, was

on a commission basis, that was his principal interest in making the sales; he naturally found that it was easiest for him to make a sale by splitting his commission, coming back to us and begging for more.

The other objection is just as great, if not greater, and that is that the distributor did not only sell cement, he sold many kindred articles, such as coal, lime, gravel, sometimes hardware, marble, and if a customer got sore at him because he received some poor coal, or short-weight coal, or a poor article of the other kind, why, he naturally didn't buy any cement from him, and we, as the manufacturers, suffered, and had nothing whatsoever to do with it. So, we wanted our contact direct with the dealer who was the principal buyer in those days.

Q. Now, since you have been associated with the
32660 Lone Star Company, what has been its policy as to the basis on which it sells its cement?

A. It has been on a delivered price with the exceptions that I have enumerated before, on some railroad business, some Government business, and some trucking business, when it was in. We have had no distributors, however, in taking over the Hudson property. The previous company had one over in the New Haven area, and as soon as we could, without offending the gentleman, we discontinued that.

Q. And are your reasons for having the delivered-price method, or policy, the same as the reasons you stated with respect to the Dixie Company selling from its Richard City plant?

A. Absolutely; there is no change.

Q. Have your customers ever expressed any opinions to you on this delivered price subject, Mr. Koch?

A. Well, in the Southeast they were very profuse in their praise of that method. I have never—I don't recall any objection to the method, whatsoever.

32661 Q. Have you given any consideration to the attitude of dealers, and the trade generally, in con-
32662 nection with adopting or maintaining any delivered price policy with respect to the companies with which you have been associated?

A. Well, naturally, I can only assume that before my time in the business, that those that started the plant in Kansas contacted the dealer and found out what the dealer wanted; the dealer had no way of figuring out his course.

Q. Now, what was the attitude of these dealers which you had in mind at the time you either adopted or continued the delivered price policy for any of these companies?

A. Well, I never had one of them object to it; on the other hand, I say I had very many of them saying that they liked it very much, it saved them time, assured them of what the cost was.

32663 Q. And as far as you were concerned, in your experience, you found that to be general; is that your testimony?

A. Oh, yes.

Q. Do you find that there is any advantage to a company selling on a delivered-price basis, Mr. Koch?

A. Certainly.

Q. What is the advantage or advantages?

A. Well, the principal advantage is that it gives the dealer your actual cost, what it costs him to get it there; it enables you to meet competition at that destination.

Q. Now, are there any exceptions to your general policy of selling at delivered prices?

A. Yes, we sell railroads f. o. b. tracks at our mills; we sell the Government; there was a time when we sold to trucks at certain mills; we still sell to trucks in the

32664 Washington warehouse. There are times when we sell to barges at the mill.

Q. And how about the Federal Government?

A. We sell the Federal Government at the mill, too, if we know the destination—or what it is going to be used for.

Q. How do you sell cement to railroads, Mr. Koch?

A. Well, that's an old practice that has come down, you might say, through the ages since I have been with them. It started at a time when the railroads were expanding and building out over the country, and were the largest individual users of cement, and we felt that on a reciprocal basis we should get the highest possible price we could from them; namely, our base mill price, so they have been quoting—we have quoted them that ever since; but we do quote two other ways, to them, if they are interested in the business; namely, f. o. b. their junction point, if they don't reach our mill, or f. o. b. destination.

Q. What did you mean by the expression "reciprocal basis" in your statement concerning railroads?

A. Well, cement is a heavy-weighted commodity; it is a

very desirable commodity, in our opinion, for the railroads to transport. It generally loads heavily towards the capacity of a car, more so in the past than perhaps it does now. We feel that a railroad receiving a lot of tonnage from you should reciprocate and pay you a good price for your cement.

32665 Q. Did I understand you to say that was one of the reasons why you endeavored, wherever it was possible, to get the benefit of your full base?

A. That's right.

Q. As a mill net?

A. That's right.

32666 Washington, D. C.,
Friday, February 16, 1940.

32669 HARRY C. KOCH thereupon resumed the stand and testified further as follows:

Direct Examination by Mr. Brick (Continued).

Q. Mr. Koch, in the latter part of yesterday afternoon we were discussing your experience in connection with sales to railroads, and you stated that for some time it had been a practice to sell in some situations to railroads on a delivered price basis as well as others.

A. That is correct.

Q. Now, from your experience, how long has such a policy as that been in effect?

A. Well, I could not fix the absolute dates. It is a matter of evolution. My best recollection would be that the selling f.o.b. junction point came in along about 1912 and the destination price perhaps 1920, or thereabouts.

Q. What was the reason, Mr. Koch, for quot-
32670 ing f.o.b. junction point?

A. Well, it was purely a competitive—well, I should not say competitive condition; it was an attempt to meet a competitive price with the carrier that perhaps participated in some of your tonnage, as one of the carriers in a through haul, and for which you felt that you had good reciprocal trading reasons. And, again, the purchasing agents of those lines generally informed you that they were closely scrutinized by the Interstate Com-

merce Commission, and they could not pay one man more than another.

Q. Mr. Koch, in selling f.o.b. junction point, were you enabled to enlarge the number of railroads to whom you were selling?

A. Oh, yes.

Q. In what way?

A. Well, naturally, if similar bases, or equal bases, I might say, occurred on mills on different lines, and you were a mill on an off line, you had to pay, or the carrier had to pay your local rate up to the junction point, why, your price would be much higher than that which you obtained from the mill that was located on his line.

Q. Well, am I correct in understanding from what you said that you were able to sell to railroads which were not on a line near your mill and which previously you had not been able to sell on the f.o.b. mill basis?

32671 A. That is correct.

Q. Now, Mr. Koch, before you went with the Lone Star Company did any of the previous companies with which you were connected sell to the Government f.o.b. mill?

A. Oh, yes.

Q. Which company sold in that way?

A. Well, the first company I was with, the Sunflower Brand, or Kansas Portland, sold that way; the Iola Portland sold that way; the Texas Portland would have sold that way if there had been any inquiry on Government business. And we carried the practice on and showed it in our marketing policy and trade ethics publication.

Q. Now, when you bid f.o.b. mill on behalf of Sunflower Company, or the Iola Company, how did you compute your bid price?

A. Well, we computed them by two methods: Most of the Government business in those days was for reclamation work in Utah, Montana, South Dakota, Colorado, and, according to its location, we attempted, as we do now, to estimate the delivered cost and take the railroad rate, or the land-grant rate, which, of course, is a railroad rate for Government purposes, and arrive at a mill base to quote. Otherwise, we quoted destination prices.

Q. Did the Government at that time advise you of the destinations at which the cement was desired?

32672 A. Always.

Q. Now, how far back does that situation go?

A. That would take me back to 1905.

Q. Were all of the Government requests for bids made on an f.o.b. mill basis?

A. Oh, no.

Q. Was there any particular way of distinguishing between those which were, and other methods?

A. No, no way other than using your own judgment on them.

Q. Well, in a general way, Mr. Koch, how did the Government request its bids?

A. My recollection is that they generally requested destination price. In a few instances they might have asked you for a mill price.

Q. And on what basis did the Government make its awards with regard to those various methods of bids?

A. So far as I have been able to observe, in my experience, with a few possible exceptions in the early days, they awarded them on the cost to the Government at the point of use.

Mr. Wooden: Your Honor, here is another point where we have had testimony over and over again on that point, and I think I have frequently offered to admit that the Government, like any other purchaser that wants to use cement at a given place, will naturally figure the cost of it from various sources, at the place it wants to use it, in order to determine which is the most advantageous purchase,—no dispute about it.

32673

Trial Examiner Norwood: Both sides have shown that these awards are made on the basis of cost to the Government at point of use. Is there any use of showing that any more?

32674

Mr. Wooden: This admission applies to all periods of time. It is an all-inclusive proposition that any purchaser is going to find out what it is going to cost him laid down at the place. We do not need any proof it.

By Mr. Brick:

Q. Have you anything to add to that answer, Mr. Koch?

A. They had in the early days, 1905, 1907, and '08, and even up into 1909 and '10, certain desires for brands that they had found served their purpose very well, and the reclamation buyers had a leeway of 10 cents per barrel

as against the lowest price, if they desired some favorite brands.

32675 Q. We have been talking about bids to the Federal Government, and your discussion of that subject has gone back to 1905.

Now, does that general situation, and the various factors and conditions which you have explained, relate also to business bid with State highway departments, and all governmental bodies, generally?

A. No, my testimony as given relates only to the Federal Government.

Q. Yes, sir.

Now, since you have been connected with Lone Star, what has been the policy of that company in quoting the Federal Government?

A. We have continued on the same policy by one method or another.

Q. Now, will you describe what those methods have been?

A. Well, we have quoted them at destination; we have quoted them at mill. Of late years we had, what I think I have noted in the evidence, what is called a control clause, which attempted to give them a price at our mill for invoicing purposes, so that they could move the shipment on their land-grant rates. In certain instances, now, we are quoting on an equalization basis. The things are changing from almost day to day; but the whole principle is still involved.

Q. You refer to the principle of selling f. o. b. mill?

A. Yes.

32676 Q. Have there been times, Mr. Koch, when you had bid your base figures without taking into consideration any railway freight factors?

A. Yes, there have been some times when we did not take into consideration the railroad rates, or even the destination, other than some wide area generally confined by the proposal or invitation for bid.

Q. Did you find that the cases where you bid mill base that they worked out satisfactorily, or unsatisfactorily?

A. Well, in later years, after the '20's, I would say that they worked out quite unsatisfactorily.

Q. Now, will you explain the conditions which made it unsatisfactory?

A. Well, from our angle, we didn't get any awards, and the awards were made on another basis.

Q. On what basis?

A. On a delivered cost.

32677 The witness identified Resp. Ex. 2349 through and including Resp. Ex. 2349 Z-10, as papers from Lone Star's file on an invitation for bids by the War Department, Mississippi River Commission, of the first and second districts, with headquarters at Memphis, Tenn. The bids were received March 17, 1927 on 100,000 sacks of what the War Department called high early strength cement, but in reality it was not high early strength but a quality a little higher than the average normal cement.

The witness identified Resp. Ex. 2349 F as a letter from Pierson, sales manager of Lone Star's Indiana Company, signed by him, calling attention to the proposal and asking for instructions. The witness identified Resp. Ex. 2349 G as a letter dated February 23, 1927 from Louis Rosner, sales manager of Lone Star's Kansas Company on the same proposal, asking for instructions. The

32678 notes on the left hand margin are in the handwriting of the witness. He identified Resp. Ex. 2349 H as a tabulated report from Lone Star's laboratories on their determination of its product and three competitive products with respect to tensile strength and other specification features. That tabulation was made to determine whether or not Lone Star's product would meet the requirements of the specifications in this particular proposal. He identified Resp. Ex. 2349 I and J as a letter of February 28th from Mr. Johnston, vice-president of Lone Star's Alabama Company, on the same invitation for bids. That is not Mr. Johnston's signature at the bottom of the letter. It was dictated by Mr. Johnston but probably signed by a stenographer, but the witness accepted it as a report from Mr. Johnston. The wit-

32680 ness identified Resp. Ex. 2349 K as his own letter of March 5th to Lone Star's Kansas Company with copies to its Alabama and Indiana Companies, instructing them how to bid; Resp. Ex. 2349 L as another letter of March 5th which he prepared addressed to Lone Star's Indiana Company, with copies to Birmingham, telling them how to get the required samples down there and any further instructions in connection with the bid; Resp. Ex. 2349 M as a letter addressed by the witness' assistant to Lone Star's Indiana Company, with copies to the Alabama and Kansas Companies, calling attention to the fact that the witness overlooked Lone Star's discount terms; Resp.

Ex. 2349 N and O as a letter of March 8th from Pierson, Lone Star's sales manager of the Indiana Company, calling attention to the proposal and asking for other instructions including whether or not he should bid on Lone Star's high early strength cement known as "Inco", later "Incor".

32681 Trial Examiner Norwood: Now, I think before we take any further time—and you could take at least two hours describing them here; it took the Reporter some 15 or 20 minutes to mark them—I think it might save time if you will tell me the purpose—

Mr. Brick: I thought I had, Your Honor.

Trial Examiner Norwood: —of these papers.

Mr. Brick: Well, I can repeat what I said previously. These papers constitute the file of the Lone Star Company with regard to the Government's proposal, which the witness has described. The papers which we have discussed, and the balance of the papers in that particular file, relate to the inter-office communications of the company relating to the bid. They explain the method of the bid which was to be made with regard to that proposal, the reasons for making it, and the results of the bids which they did make.

32682 Trial Examiner Norwood: Does this explain a bid about which the Government has put in some evidence?

Mr. Brick: It explains, if Your Honor please, general statements made by Government officers with regard to methods followed by this company and other companies.

Trial Examiner Norwood: Yes.

Mr. Brick: Naturally, this particular bid was not brought out by the Government, or discussed per se by it, because it is one of the examples of f.o.b. mill bids, and does not follow the position taken by the Government in the case. The Government was only interested in f.o.b. destination bids—

Trial Examiner Norwood: Yes.

32683 Mr. Brick: —and it was such bids as that that we spent the five or six months' testimony on last year, and the year before, in connection with the identical results of such bids.

In other words, this is different from the picture shown by the Government.

Trial Examiner Norwood: This is a case where you did not have identical bids?

Mr. Brick: Yes, sir.

32684 Trial Examiner Norwood: And let us examine them as to their materiality and the relevancy of them, and let us not waste so much time on it.

32685 Mr. Wooden: I will say as far as identification is concerned, that without even looking at the papers we will admit what they purport to be.

Trial Examiner Norwood: Yes.

Mr. Wooden: I will say further that the witness has already testified in substance and in general about having made f.o.b. mill bids for the Government.

Mr. Brick: Well, I understand then, that Mr. Wooden will make no objection to the competency of these papers?

Mr. Wooden: I did not say that.

Trial Examiner Norwood: He said the identification.

Mr. Wooden: The identification, to save you the trouble of identifying them.

32689 (RESP. EX. 2349-R, 2349-S, and 2349-Z-4 was offered and received in evidence.)

32690 (RESP. EX. 2349-Z2 and 2349-Z3 was offered and received in evidence.)

32691 By Mr. Brick:

Q. Mr. Koch, in connection with this bid which we have under discussion, what terms and conditions of sale did the Government attach to its proposal for bids?

A. You mean as to the point of delivery?

Q. That would be one. I would like to cover all of them.

A. They had a qualification for a certain kind of cement that varied from what we would know as meeting standard specifications.

32693 Q. Mr. Koch, in connection with the terms and conditions attached to this particular proposal which we have been discussing, what provision, if any, was made for informing the prospective bidder of the destination at which the cement would be used?

A. None whatsoever.

Q. Now, in the light of that condition, what action did you take with respect to preparing your bid?

A. We bid, as the proposal required, which stated—or, rather, asked for "our price f.o.b. cars, blank."

32694 Q. Now, how did you bid? F.o.b. mill?

A. We bid f.o.b. our Indiana mill, f.o.b. our Alabama mill, f.o.b. our Kansas mill.

Q. And how did you determine the figure which you bid?

A. We used a mill base.

Q. In each of the cases?

A. Yes.

Trial Examiner Norwood: What was the date of that bidding?

Mr. Brick: 1927.

The Witness: March 17th; St. Patrick's Day.

By Mr. Brick:

Q. Did you obtain any of the awards with respect to any of the bids which you made?

A. We did not. The award was made, as I recall that one, to the Hermitage Portland Cement Company for delivery at Cairo, Ill.

32696 Q. Now, Mr. Koch, showing you Respondents' Exhibit 2349-Z-4, I ask you whether or not that tabulation indicates the manner in which the bidders submitted their bids as to what point was f.o.b. (showing document to witness)?

A. It does: It is a tabulation made of the opening of the bids; it shows every company entering bids, giving prices on their—on the material offered; the speci-

32697 fications that it met.

M. Wooden: Your Honor, that is an identifying question, and we waived the identification of that document.

A. (Resumed) And showed a great many—

By Mr. Brick:

Q. Does it show which, if any, of these companies bid f.o.b. mill?

A. It does, and it shows which—

Q. And shows those which bid f.o.b. destination?

A. Correct.

Q. With respect to the bid of the Hermitage Company, did that company bid f.o.b. mill or f.o.b. destination?

Mr. MacIntyre: I object.

Trial Examiner Norwood: The objection is sustained. That shows right on the paper there, doesn't it?

Mr. MacIntyre: In so far as the witness would know about it, it appears to be shown on the paper.

Mr. Brick: I know it appears here, because it has been explained to me. I am not so sure that one who did not

have the benefit of the explanation of the cement man would appreciate that it appeared here.

Mr. Wooden: Well, we agree that wherever the quotation was made f.o.b. a certain point by a mill which is located at that point, that that is f.o.b. mill.

32698 Mr. Brick: Well, with that understanding, why, that is perfectly all right.

Trial Examiner Norwood: Yes.

Mr. Brick: I just wanted to make sure that the record shows that the Hermitage Company bid f.o.b. destination, and was awarded the bid.

By Mr. Brick:

Q. Now, Mr. Koch, I would like to direct your attention to Respondents' Exhibit 2350-A to and including 2350-P, and ask you if that group of papers constitute the file of your company with respect to a proposal for a letting of April 21, 1927, the proposal having been issued by the U. S. Engineer's Office at Memphis, Tenn. (showing documents to witness)?

A. That represents our file on the proposal calling for bids on 120,000 bags.

Q. There are inter-office communications in this group of papers, are there not?

A. There are.

Q. Did you act upon the communications which you received from your sales managers at the various branches concerned with this bid?

32699 A. Well, we generally instruct them; they write in for instructions as to how they should bid.

Q. Yes, sir.

A. So that represents inter-communications, all of which I handled, or passed through my hands for notations, and action was taken in accord with my instructions.

Q. Mr. Koch, are the letters prepared by you and forwarded to your sales managers at various branches included in this report (indicating)?

A. Yes.

Q. And those are the letters in which you told them how to bid?

A. Correct.

32705 (RESP. EX. 2350-A to 2350-P was offered and received in evidence.)

32710 By Mr. Brick:

Q. Mr. Koch, did your company bid with respect to proposal issued by U. S. Engineer's Office, at Memphis, Tenn., for a letting of October 18, 1927?

A. We did.

32712 Trial Examiner Norwood: I think it would save time if you would just state that on these three occasions they bid f.o.b. mill, and give us a few particulars there.

Mr. Brick: Well, this cannot be likened to the situation of the Government offering its thousands of delivered-price bids, because we have the benefit of Mr. Wooden's concession that there have been numerous f.o.b. mill bids; but what we are endeavoring to do here is to show how the f.o.b. mill situation worked out, and why it became necessary because of market and competitive conditions for this company to change its policy, and to quote on a delivered-price basis.

Trial Examiner Norwood: Well, we have admitted one complete file there to show all of that; is it necessary to put in two more files?

Mr. Brick: If Your Honor please, I could have gotten hundreds of illustrations of a situation. I selected three, because they related to three lettings which occurred within the same year in which the results, the basis on which the awards were made, and the bidding in each case, were different. In other words, there was a chain of circumstances on the part of the bids and on the part of

32713 the Government in making the awards, and it shows a development and the action that took place as far as this company was concerned, as to how it arrived at the delivered-price policy.

Trial Examiner Norwood: In view of what Counsel has said, if he will assure me they will save time; that is, that he is not going over this whole ground again with this witness, getting oral testimony to the same effect, I think that the shortest way to do this is to receive those three, since Counsel has represented they reveal the development along this line.

Mr. Brick: Yes, sir.

Trial Examiner Norwood: It appears that the three will make a complete study, and regardless of their irrelevancy, I think that if you will take up another sub-

ject thereafter I shall overrule the objections and
32714 receive these three; that is, one that is already in conditioned as heretofore—that is, that those inter-office communications and letters between members of the company are not to be received to prove the truth of the factual statements contained therein.

So I shall receive Respondents' Exhibits 2349-A to Z-10, and 2351-A to Z-1, with that understanding.

Is that your understanding of the effect of receiving these? Does it shorten up the oral testimony?

Mr. Brick: I understand what Your Honor has said with regard to the ruling. I cannot say that I understand its application in every respect. The condition has been placed on the reception of the evidence. I do not know how broad that condition is.

Trial Examiner Norwood: Yes.

Mr. Brick: Your Honor has said that it will not be received to show the truth of any of the contents.

Trial Examiner Norwood: No, I did not say that. Any factual statements in the inter-office communications and letters between members of the company. As for those bids and copies of those bids, and as for the invitations, and so on, they are not conditioned in any way whatsoever.

Mr. Brick: Well, in other words, so far as the letters of the witness are concerned, I assume that the
32715 statements made in each of his letters will be received with the same effect as though he had testified to the facts contained in those letters?

Trial Examiner Norwood: No.

Mr. Brick: Then, I will have to ask him. In other words, here is the man who makes the policy. I want to ask him why did he make it.

Trial Examiner Norwood: He can show what he received and acted on, and indicate his method.

Mr. Brick: That does not serve my purpose completely. I can appreciate Your Honor's effort to shorten up the testimony on the subject, but you put me in this position—

Trial Examiner Norwood: You can bring out any factual matter.

Go ahead.

(RESP. EXS. 2349-A to 2349-Z-10, and 2351-A to 2351-Z-1 were offered and received in evidence.)

By Mr. Brick:

Q. Mr. Koch, in connection with the bid of October 18, 1927, which is covered by 2351, now in evidence, under what circumstances, and why did you bid both an f.o.b. mill price and a delivered price at Memphis and a delivered price at Cairo?

A. Because in the letting of March 17th, asking 32716 for a price at point of delivery blank, an award was made the following June to the Hermitage Company at a delivered cost at Cairo, Ill.

The bid of April 4th—I do not think that is the correct date (referring to papers)—April 21st, was submitted by us on this call before the award was made on the March proposal. The destination on the April 21st call for bids again was for destination blank. It was awarded to the Marquette Company f. o. b. barge at Cape Girardeaux.

Based on that, when the proposal came out for October, it called for price per sack f.o.b. cars at a mill located at so and so. We had reason to believe, because of the previous two awards, that the f.o.b. mill price had little bearing and that there was no chance of being thrown out by not bidding in conformity with the proposal. Therefore, we offered our cement both at the mill and at Cairo, because a previous award had been made at Cairo.

According to the Government tabulation before me, signed by Major Core of Engineering, with their certain work figures taken off, they made this award to the Atlas Company, who not only bid f.o.b. their mill, but who chose a number of points ranging from Caruthersville, Mo., down to Rosedale, Miss., the farthest, most southerly point that comes under the jurisdiction of this Mississippi River Department at Memphis. That award was made to 32717 the Atlas Company by deducting figures which purport to be the tariff rate from Hannibal, Mo., to Rosedale, the most southerly part, and then using the price arrived at at the Hannibal mill and applying the land grant and awarding it for delivery at Caruthersville, Mo.

Q. Now, in connection, Mr. Koch, with the letting of October, 1927, the one covered by Exhibit 2351, did you say that the awards were made on the basis of destination cost at various points between Cairo and the mouth of the White River?

A. Not exactly that, Mr. Brick. If I may be clear, they took the most southerly point and took off the transporta-

tion charge from Hannibal, Mo., to get a mill price, or a price f.o.b. at the mill. Then they computed a rate to Carthersville and by that means figured their lowest cost, or at least awarded f.o.b. Carthersville, although their proposal had asked for a bid f.o.b. mill.

Q. Did your company get any part of the award with regard to that October letting?

32718 Q. We got none of the award on either one of the three, although I think there is one of them we protested at Memphis, but availed us nothing.

Q. And what was the nature of the protest?

A. Oh, that the proposals were not fair, that the method of bidding was not fair.

Q. And that was a situation where your company bid f.o.b. mill?

A. We bid in compliance with the proposal.

Q. Now, I think you—

A. I might add that that goes right back as a basis for checking back to your mill giving them an invoicing price that probably had to do with the so-called control clause.

Q. Since 1933, Mr. Koch, how has the Government usually requested bids? I am speaking of the Federal Government.

A. They requested bids in different manners: One of them was f.o.b. destination; another one f.o.b. mill with destination shown; another way by f.o.b. mill with no destination shown.

32720 Q. Well, so far as your company was concerned, did you find that the f.o.b. mill method of bidding was successful and in the interest of your company?

A. The facts are we had to change our methods.

By Mr. Brick:

Q. Because you found it successful, or unsuccessful? The question was, did you find it successful?

A. Because they found a certain way unsuccessful. We had to do what we thought would get us business.

Q. Now, you have mentioned the various types of bids for which the Government has issued invitations. Will you state whether there was any difference in the manner in which the Government determined the awards

32721 on those various types of bids?

A. Well, I think—there is one definite thing—

which they determine, which has previously been stated as their ultimate cost; however, some departments accepted an equalization clause; some departments accepted what has been spoken of as a control clause, and some departments take only an f.o.b. mill price which is finally figured out to their f.o.b. destination cost.

Q. Is it the present policy of your company to bid f.o.b. mill, or destination cost?

A. We bid them all three ways, according to our feeling at the time.

Q. And what factors do you consider in making your decisions?

A. Well, we have ceased to bid unless we know the destination. When a destination is known, and we make a computation, if it is interesting business, we offer our wares.

Q. Do you ever have any discussions with your competitors with respect to the manner in which you bid on Government business?

A. No, sir.

Q. Have you ever had any understanding or agreement with regard to the way you bid?

32722 A. No, sir.

Q. Now, to go back to your early experience again, Mr. Koch: I think you stated that in connection with Government business sold by the Sunflower and the Iola companies, that you used land-grant rates on occasions.

Now, will you explain how you obtained the land-grant rate information at that time?

A. We used to get it from the carriers and sometimes from the Reclamation Department.

Q. Were you able to obtain division sheets?

A. Well, the railroads never give us their division sheets; but they will usually tell us what the division is.

Q. Did you find that the land-grant rate information that you received from the railroads was accurate?

Q. In your experience, Mr. Koch, what did you find with respect to the accuracy of the information you received from the railroads?

32723 The Witness: My experience, Your Honor, from railroad and other work, is that railroads' accounting offices are, or were, more capably equipped, and, therefore, quoted more accurate rates than the Government. However, they tell me now that the Government is the

last resort regardless of the correctness of the calculation.

By Mr. Brick:

Q. Have you ever had the publications of the Quartermaster General, which gave land-grant rates between various points?

A. Oh, yes.

Q. When did you first have the benefit of that publication?

A. Oh, I had that publication, I would say, back in 1910 and 1911.

Q. And have you had the benefit since that time?

A. We have the current copy.

Q. Where did you procure it?

A. From the War Department.

Q. Now, in recent years, Mr. Koch, have you ob-
32724 tained land-grant rates or land-grant information?

A. We still secure them from the railroads, or copy of them from the Government tabulations when awards are made.

Q. Under what circumstances, Mr. Koch, did you adopt the use of the so-called control clause which you have stated your company has used from time to time?

A. Well, as I recall, someone, during the Code days—that is, the existence of the N. R. A. Code—filed a destination cost price with that control clause in it, and it rather appealed to me in view of what we had passed through in 1927, and before, as being a good thing to adopt for our use.

Q. Do you find that any particular Government departments favor it over other forms of bids?

A. I believe the War Department has favored it somewhat in certain departments.

Mr. Wooden: Your Honor, I object, and ask that be stricken as simply stating the belief and conclusion of the witnesses without giving any facts on which to base it. We have had testimony from the War Department officials on that subject.

Trial Examiner Norwood: Read the question and answer.

32725 (Last question and answer read by Reporter.)

Mr. Brick: I merely asked him, if Your Honor please, what he found to be the situation.

Trial Examiner Norwood: Well, it does not appear

that he is speaking from his own knowledge about that. Now, you may give any facts of his experience bearing on that, but I think that the Counsel is right, that it is just offhand opinion on that and should not be received here in evidence.

Mr Brick: Yes. Let me put another question.

Trial Examiner Norwood: The motion is allowed.

Mr. MacIntyre: Off the record.

Trial Examiner Norwood: Off the record.

(There was discussion off the record.)

Trial Examiner Norwood: Go ahead. Proceed.

By Mr. Brick:

Q. Now, tell us what the facts are, Mr. Koch, in connection with whatever knowledge you have as to the attitude of Government departments with regard to the use of the control clause?

A. Well, to the best of my recollection at the moment, the Army, Fort Riley, Fort Leavenworth, and I believe Chester Scott Field, in Illinois, seemed to approve it.

Mr. Wooden: There, again, Your Honor, it is the same thing, "seemed to approve it."

32726 Trial Examiner Norwood: Yes.

Mr. Wooden: Which shows that—

Trial Examiner Norwood (interposing): You will have to tell us what the facts are about it. Did they approve it or did they not? Do you know anything about it.

The Witness: I would say they do, but, to the best of my recollection.

Mr. Wooden: Your Honor, we had the testimony of Major Feldman, of the War Department, about a circular that is to my mind obviously the basis for the witness' claim, and that was direct testimony about whether they approved it or not, simply a meeting of the situation they could not escape. That is all there is to it.

Mr. Brick: Mr. Wooden, you say you concede that certain departments of the Government have looked upon the control clause with favor?

Mr. MacIntyre: No. We concede just what the circular shows, and it is in evidence.

Trial Examiner Norwood: I think that the motion must be allowed to strike that last answer.

32727 By Mr. Brick:

32728 Q. Now, did you, in quoting the control clause, intend in any way to deprive the Government of any benefits of land-grant rates?

A. I did not think so.

32729 Q. Now, what were your general purposes in using that control clause?

A. Well, we tried to place ourselves in a competitive condition at the point of use.

32729½ Q. Mr. Koch, are you familiar with what has been called the equalization clause used in connection with bidding to the Federal Government?

Mr. Wooden: Your Honor, I object to that as going into a subject that is subsequent to the issuance of the complaint. It is simply an anomolous development in the case of one or two departments, and I do not see that it has an relevancy or materiality to the case, and I object to it.

It was brought out when Mr. Coogan was on the stand and gone into very thoroughly, over our objection.

32730 Trial Examiner Norwood: These things you are bringing in are things that were employed by these Respondents subsequent to the issuance of the complaint.

Mr. Brick: Yes, sir, in answer to charges made by the Government and proof introduced by the Government with respect to other transactions occurring after the complaint was issued.

Mr. Wooden: It is perfectly proper and logical for Counsel for the Commission to introduce evidence showing a continuation of practices charged in the complaint. It is not logical or relevant to have Respondents bring in a particular instance where there was not a continuity. We do not have to prove continuity. We did prove it in a number of cases, and it does not meet any issue.

Trial Examiner Norwood: I should think they would be confined to the actual instances of continuation that were brought out.

Mr. Wooden: That is what I was going to say.

Trial Examiner Norwood: Otherwise we are
32731 bringing in a white swan to disprove that there are black swans.

Mr. Brick: If Your Honor please, that is tantamount to saying that we have to be guided in offering our de-

fense by the limits to which the Government might have adhered in support of their proof.

Mr. Wooden: Continuity, yes.

Trial Examiner Norwood: I think you have to be guided by what evidence has been produced against you. To prove that in other instances you did not does not prove that in some instances you did.

Trial Examiner Norwood: Objection sustained on that.

32734 Mr. Brick: I understand the last ruling of Your
32735 Honor will apply to anything concerning equalization, of course. I merely want to know the state of the record.

Trial Examiner Norwood: I think in our discussion we confused equalization clause with control clause. Which do you mean? Which do you mean, the control clause of the equalization clause?

Mr. Brick: No. The equalization clause, sir.

Trial Examiner Norwood: Now, that is a device that was not used prior to the issuance of the complaint, isn't it?

Mr. MacIntyre: So far as we know, it was not.

Trial Examiner Norwood: Now, just put your offer of proof on. That will give you the advantage of your exceptions on that with respect to this equalization clause.

Mr. Brick: I offer to prove through this witness, if permitted so to do, that the Lone Star Company used the equalization clause as described in other parts of the record; that they did so because some of the Government departments looked upon it with favor; but they did not adopt its use as a matter of policy, and used it only in connection with those proposals where they thought its competitive position would be better through its use.

32737 By Mr. Brick:

Q. Now, in connection with the different methods which the Lone Star Company has followed in bidding to Federal Departments, have any of those methods been the result of any understanding or agreement among the Lone Star Company and its competitors?

32738 A. No, sir.

Q. Now, has your policy; that is, your company policy, with respect to the manner in which you have bid on any of the Government lettings, been determined in any way by The Cement Institute?

A. No, sir.

Q. Did you ever refrain from bidding on any Government lettings?

A. Yes.

Q. Did you ever refrain from bidding on any project by reason of any agreement or understanding with any of your competitors?

A. No.

32739 Q. Mr. Koch, in your experience, have you found that there are any items connected with Government sales that add to your sales expense?

A. Oh, there are such things as bonds.

Q. How about warehouse facilities?

A. Well, that is a cost. I do not know whether you would call it as a sales expense or an operating expense, but it is always more or less bothersome than it is with the majority of commercial business.

Q. And what is the relative situation with respect to the testing of Government cement and the placing of it in bins as compared with your usual commercial operation?

A. Oh, that is usually carried in specifications when you bid, and calls for taking samples in different ways. Sometimes your mill is located where they have on inspectors, and they designate someone from afar to come in.

32740 Q. Mr. Koch, has your company at various times observed a minimum net below which you would not go, in bids to State authorities?

A. We have, generally speaking.

Q. Do you recall any special instances?

A. Oh, yes, in State highway purchases; the States of Louisiana, Missouri, Iowa, Illinois, and Indiana.

Q. And what time do you have in mind, Mr. Koch?

A. Well, that was when the States were buying their yearly requirements for highway work.

Q. And what years?

A. Oh, I would say that ranged in from about 32741 1928 down to about 1932 or 1933; may have been longer in some instances than others, and, I believe—well, I don't believe, I know that the State of North Carolina still buys most of its highway requirements.

Q. Now, Mr. Koch, what has been the general policy of Lone Star with regard to adhering to its published prices?

A. Well, we have endeavored to adhere to our published prices; we have deviated both up and down—or, I mean, down, not up.

Q. Does Lone Star submit quotations, written quotations, from time to time, to all of its trade?

A. Yes, on what we term a canvass quotation; it is a general circularization.

Q. Now, you spoke of your general policy being that of following one price policy; what were the reasons for adopting or continuing such a policy?

A. Well, we always felt it was a very good policy, it assured most of the buyers that they were getting the benefit of the best we had in the shop, and did not require all their time trading for lower prices.

Q. You mean, in connection with trading with your company for the purpose of getting lower than the price originally quoted to the customer?

A. Yes.

Q. Getting back to the State bids, Mr. Koch:
32742 In 1931, '32, and '33, do you recall whether or not you followed a minimum mill net in connection with computing bids on the Iowa Highway Commission bids, and the bids of Indiana and Illinois lettings?

A. Yes, we followed that in a number of instances.

Q. I want to place it definitely in your mind, and the record shows that your company bid in connection with Iowa business in 1931, and the Indiana and the Illinois business in 1932 and 1933, and Mississippi business in 1933. Now, what was your purpose in maintaining such a minimum mill net?

A. Well, there were two purposes. Some of the States in their proposals stated that a bidder that did not cover all points would not get the same consideration as the bidder that covered all of the points.

Mr. MacIntyre: Your Honor please, I would just like to call attention to the duplication of the testimony by representatives of this company on that particular point—unless it is offered for the purpose of impeaching a prior representative of this company that was on the stand and testified to the same effect.

Trial Examiner Norwood: I think that you will find that along here at page 6139 (referring to the official record), and following, that Mr. Neylan told us all about these matters there, and I am going to ask the Counsel not to duplicate.

32743 Mr. Brick: Of course, I have no intention of duplicating. The reason that I am going into this at all, Your Honor, is that Mr. Koch is the vice-president in charge of all sales of his company. Mr. Neylan, and any other witnesses of the company who have testified to date in this proceeding, work and operate under Mr. Koch's direct supervision, and I am interested in finding out the reasons for policies which Mr. Koch has set, and which have been followed by reason of his instructions by other persons from the company who have testified as sales representatives.

32744 By Mr. Brick:

Q. I will ask the witness if he has anything to add to his answer.

A. Well, there was the other feature, that we wish to preserve a minimum net realized to us. We did not want to be burdened with a lot of cheap business, and none of it good business.

Q. Now, under these circumstances—

32745 Trial Examiner Norwood: Now, how would you preserve that minimum net realized?

The Witness: I will explain it to Your Honor: Assume that a point netted me but $1.15; I would quote that point, and I might quote on the basis so that my net realized would be $1.25. Therefore, my bid would be 10 cents higher than what I would reckon was going to be the price there based on basing points as I knew them.

By Mr. Brick:

Q. Now, did this, in effect, have the result of making your bid higher than the bids of your competitors?

A. At certain points.

Q. Now, can you give any specific instances, Mr. Koch, of proposals which contained the provisions which required you to bid at other points?

A. Yes, I would say Louisiana and Missouri and Iowa, offhand.

Q. Were there others, also?

A. Well, if there were not, we used the same policy, so that they couldn't change their mind on it.

Q. Yes. (Long pause.)

Trial Examiner Norwood: Go ahead.

Q. Yes.

When you bid, Mr. Koch, in this way; that is, using a

minimum mill net; was the minimum figure at which you were willing to set a figure, at which you were willing
32746 to sell all of the cement that you could produce?

A. Oh, no; oh, no. I wouldn't want to sell all our cement at the minimum price.

Q. Do you recall, Mr. Koch, the so-called Good Friday bids—if I might put it, the Good Friday proposal which the Procurement Department issued in April of 1938?

A. Yes, I recall them.

Q. The record shows that your company did not bid in connection with that proposal. Will you state the reasons why it did not bid.

A. We lodged a letter with the Procurement Division setting forth our reasons, and, as I recall, the reasons principally were that it was a deviation from any practice we had been pursuing. We did not—we felt that it would interfere with our dealer policy, and, accordingly, did not care to enter a bid.

Q. Did you have any discussions with any of your competitors as to the action which your company would take, or any of their companies might take, in connection with that proposal?

A. Absolutely none.

Q. Prior to the letting—that is, the date of the opening of the bids—did you know what companies were going to bid, or which were not going to bid?

A. Oh, I would have no way of knowing.

Q. Now, you have stated that as a general pol-
32747 icy Lone Star Company adheres to one price policies; has your company, on occasion, deviated from that one-price policy?

A. Yes.

Q. Well, what was the first of these occasions, Mr. Koch?

A. Of recent years?

Q. Yes, sir.

A. I would say along about 1931.

Q. And did prices where they made deviations apply to any particular territories?

A. I think we made deviations in all the terri-
32748 tories we covered; more in some than in others.

Q. Now, what were the conditions, Mr. Koch, which led you to deviate at that particular time from your general one-price policy?

A. Well, we were entering the so-called era of depression. We found business slipping away from us, by what we had reason to believe were methods that were not employed so generally, and it had reached a point of where we felt it affected our business more than we cared to have it affected.

Q. Now, what was the principal reason, Mr. Koch, for losing the business?

A. Well, reports, circumstantial evidence, and actual evidence, of lower prices made for the sale than were actually quoted in the field. By that, I mean the general quotations.

Q. Well, how did you obtain your knowledge with regard to prices being quoted under published prices?

A. We got photostatic evidence of invoices, checks, and—

Q. And from whom, Mr. Koch, did you get the general information which you have talked about?

A. From our field forces.

Q. Did you find that only some or many of your competitors were selling cement at prices lower than their quoted prices?

A. Well, there were too many. We might be patient with a few, but there were too many.

32749 Q. Would you say that the situation was general? In other words, tell us the extent to which you found competitors quoting under their published prices?

A. Oh, yes, I would say that practically all the area that we covered, more in some than in others.

Q. Now, did such prices—that is, those underquoted prices—apply to contractor business and dealer business?

A. Generally to contractor business for highway work, or some particular work involving a fair quantity.

Trial Examiner Norwood: What time was this?

The Witness: In 1931.

Trial Examiner Norwood: 1931?

The Witness: Yes.

By Mr. Brick:

Q. Did it continue beyond 1931, Mr. Koch?

A. Well, yes—it continued beyond that for some time, and then it eased off, and then it came back again in 1938.

Q. Mr. Koch, during the period where you sold cement at prices lower than your regular quoted prices, did you give such lower prices to customers who purchased—that is, purchased cement from your various mills, or only to those who purchased cement from some of your mills?

A. Well, there were instances in which we gave it to purchasers, I would say all purchasers, in certain sections.

Then there were instances where we treated with individual jobs in other sections. Price was not quoted to everybody, no, in no sections.

Q. Did you go below your out-of-pocket or manufacturing cost in quoting prices lower than your regular published prices?

A. I am sure we did.

By Mr. Brick:

Q. Now, you mentioned that that situation applied in regard to the year 1931. At that time had you made any reductions with regard to your base figures at various mills?

A. Not at all; some.

Q. Now, what happened in 1932 in connection with your general policy of quoting prices?

A. Well, there may have been an improvement in certain sections, and probably it grew worse in other sections.

Q. At any time did you find that competitors were lowering their base figures in order to meet the condition that you have described?

A. Some did and some did not.

Q. Did your company?

A. We endeavored not to lower our base price, but treat with the jobs individually.

Q. Did you find that your action in deviating from the policy of adhering to published quotations was successful or unsuccessful?

A. Well, during 1931 it got us quite a volume of business, but as the practice became known others met it, and then we lost. From the dealer's standpoint, and those that we sell at dealer's prices, like Ready-Mix, and other concerns, we lost somewhat in favor by not extending the reduction to them.

Q. Now, the record shows, Mr. Koch, that in 1932 you had a market condition which caused you to sell below your

quoted prices in the Mississippi Valley? Did you recall that situation?

A. Yes. I believe that is the year we got photostatic evidence of one of our northern competitors which, coupled up with the other reports from the field, caused us to take action and base our prices other than by the method we had been.

Q. And what method did you follow in that instance, Mr. Koch?

A. I think that is when we quoted our prices based on Cape Girardeaux.

Q. Was that 1932?

32754 A. It seems to me that was the year, as best I can recall.

By Mr. Brick:

Q. Does your memory serve you to state the time of the year which that might have been?

A. Somehow or other I am not definite. It seems to me it was along about June.

Q. Now, what were the circumstances which you found in that particular area, Mr. Koch?

A. Well, we found the actual quotation of signed contract form.

Q. To what effect?

A. What?

Q. To what effect?

A. Checked back to 75 cents net stripped at Cape Girardeaux.

Q. And finding that condition, what did you do?

A. We quoted our prices on that base.

Q. Which of your competitors did you find quoting the price which you mentioned at Cape Girardeaux?

A. The Marquette Cement Manufacturing Company, I believe—

Q. Did you find that Marquette had been getting dealers from you by the use of special prices?

32755 A. Yes, that was a general condition down through Arkansas, northern Louisiana, practically into New Orleans, through the State of Mississippi, over in northern Alabama, western Tennessee.

By Mr. Brick:

Q. And at that time were you losing much contract business?

A. We were not able to sell any,—at least not sufficient to satisfy us.

Q. Do you remember any particular customer of the Lone Star Company who gave his business to Marquette at that time?

A. Well, of course, when I say "customer,"—they promise us business, and we sell them here and there, and occasionally they buy from the other fellow—but it was the Hartman & Clark Contracting Company.

Q. And where are they located, Mr. Koch?

A. They were an Illinois concern bidding on highway work in the vicinity of Greenville or Tutweilers, Miss. Also I think was the Union Paving Company of Philadelphia, who were in the Texas fields, and it would be Froeming in Texas, a Milwaukee contractor, who was bidding in Texas.

Q. Now, had the Union Paving Company of Philadelphia been a customer of your company—

A. Yes.

Q. —in 1932?

32756 A. Yes.

Q. Did you lose any business to Marquette which you normally expected from the Union Paving Company?

A. It looked like we lost it. I believe we finally served it by making that price concession.

The witness identified Resp. Ex. 2352 A to and including 2352 I as Lone Star's file covering the Cohoma County, Mississippi highway letting, May 31, 1932, involving some 40,000 barrels of cement, and a photostat of a Mar-
32757 quette contract dated May 30, 1932 with the Hartman-Clark Company, which the contractor allowed Lone Star to photostat in order to satisfy itself that that was the price he was receiving.

Mr. Brick: I offer Respondents' Exhibits, for identification, 2352-A through I (handing the documents to Commission's Counsel).

Trial Examiner Norwood: That is documentary evidence to corroborate this witness as to that price cutting down, is it?

Mr. Brick: Yes, it is, and his file and notations which he made at the time with regard to his figuring, and from which he determined to meet the situation.

32758 Trial Examiner Norwood. Received as marked. Objection overruled.

(RESP. EX. 2352-A to 2352-I was offered and received in evidence.)

By Mr. Brick:

Q. You testified, Mr. Koch, that the Marquette Company was one of several companies which was quoting prices which was under their published prices. Is that not so?

A. That is correct.

Q. Did you find many instances of the Marquette Company following that practice?

A. Yes. We found enough to satisfy ourselves.

32759 We did not get photostat evidence of all of them.

Trial Examiner Norwood: They were selling below their announced prices?

The Witness: Their published price, as I recall it, was $1.25 net, or stripped at their plant, so that this point normally was based on their price plus their freight rate, and in this instance we checked it back from this photostat that they actually got 75 cents.

By Mr. Brick:

Q. What did you do to meet that situation?

A. We quoted all prices Arkansas and Mississippi Valley, and I believe Southern Illinois, Indiana, and through there clear to Texas that were affected, by 75 cents stripped, which would be $1.15 gross in cloth—which would be $1.25 gross in cloth f.o.b. Cape Girardeaux just as far as it would run.

Q. Now, after 1932 when did your company next have occasion to make sales below its published quotations?

A. I believe not until 1938.

Q. And what were the conditions which led to your following that policy at that time?

A. Well, the same Valley-Illinois-Indiana conditions again appeared following the use of considerable cement in the State of Mississippi during 1927, and we again felt that it was time for us to protect our interests by taking action in selling some business.

32760 Q. And how did you get your information as to those conditions?

A. Well, one of the basic things that happened was when we checked up the actual consumption of the State we found that far-away shippers had walked off with the big tonnage. Close investigation and prying into private affairs, and so forth, led us to believe—to believe from people in whom we had confidence that these lower-than-

published price concessions were being given quite generally.

Q. When you referred to investigation and prying into private affairs, to whose affairs did you refer?

A. Paving contractors.

Q. Now, what did you do to meet that condition?

A. Well, we started out along in May or June of 1938—it might have been April—to sell some of those jobs. We started at 20 cents below our published price, and continued on until our prices were down 50 cents to 60 cents below our published price.

32763 Q. Prior to 1937 tell us the facts, Mr. Koch, which you found in the various markets where you had been selling, in so far as your competitors did or did not adhere to published prices?

A. Mr. Brick, I would say in my entire cement experience there never was a time when certain buyers and frequently many buyers, could not buy cement below the published or quoted price, save perhaps a short period during the N. R. A., and it was not a hundred percent then.

32764 Q. Well, now, with regard to deviations from published quotations to which you have referred in your last answer, did you find that such deviations applied only to one type of business, or to the customer trade generally?

32765 A. In the earlier years of my experience, and until the larger types of work, especially highway work, came into existence, it existed with the dealer. Since then has existed more on the larger and the type of work that we sell direct than it does with the dealer, save the large dealer in the metropolitan center.

By Mr. Brick:

Q. And what was the situation with respect to him?

A. Well, he always finds a way to beat the quoted price.

32767 Washington, D. C.,
Monday, February 19, 1940.

32769 "It is hereby stipulated, that if Harry C. Koch,
32770 Vice-President of Lone Star Cement Corporation, were to testify on his direct examination with respect to the topics hereinafter indicated, he would give as his testimony with respect to those topics the statements hereinafter set forth:

32771 "Method by which Lone Star Cement Corporation obtains information as to competitors' prices and methods of marketing.

"Lone Star Cement Corporation obtains its information as to competitors' price quotations, both published and unpublished, by means of information picked up in the field by its salesmen. Its salesmen operate under instructions to transmit to the home office immediately any changes in the competitive practices or prices which they may find or hear of in the field. Its salesmen send to the home office all quotations of price changes or announcements of policy changes that they can pick up in the hands of customers and the general trade. Lone Star also gets much information of competitive moves directly from such customers by way of telephone calls or letters. Another source of such information is tabulations of bids submitted to governmental agencies which are obtained by salesmen who attend the lettings, or from reports of the bids published in newspapers and other periodicals. It
32772 does not take a very long time for Lone Star to get news of changes in competitive prices or policies. In most markets such information is obtained almost as soon as the competitive announcements are out. In all cases, the lapse of time is very short, and never more than a day, before Lone Star is fully apprised of competitive moves through the information which its salesmen are able to obtain in the field. Commodity prices published in newspapers and trade journals are also a source of information which is considered occasionally along with information acquired through its salesmen. Aside from these sources, Lone Star has no other source of information as to competitive prices.

"Determining Freight Applications from the Institute Freight Rate Books and Correction Sheets.

"Lone Star salesmen are supplied with the Institute freight rate books. In their daily work they ordinarily have no occasion to use them. Each salesman generally knows the Lone Star price at all destinations in his territory, and he quotes that price to customers there. It is only when he finds competitors' prices different from those he is quoting at some of these points that he may consult his freight rate book to see whether they reflect back to a new base at a shipping point. Occasionally, he may use the rate book to determine what price he will quote at some small out-of-the-way point where sales are seldom made. Such quotations are subject to confirmation
32773 by his sales office. The Institute freight rate books are also used by Lone Star in connection with shipping and billing. The rate applicable to any particular destination is inserted in the invoice and the bill of lading, and this rate is obtaned from the Institute rate books. The rates found in the rate books and the correction sheets thereto are seldom checked against the official tariffs. The Institute rate books are relied upon almost exclusively for the correct freight information. Occasionally, however, if there is some doubt as to the correctness of the rate in the rate book, a check is made against the official tariffs and the correct rate is used.

"Policy of Bidding to the Government at Regular Commercial Price.

"It is the general policy of Lone Star on all government work, both federal and state, not to bid lower than its regular commercial price at any particular destination. The reason for this policy, aside from the fact that Lone Star has never felt that the government is entitled to any lower price than its regular trade, is the fact that a lower price to the government reacts unfavorably upon Lone Star's customers. Where a special price is bid to the government on any particular letting, Lone Star customers seek similar price consideration. Lone Star re-
spects the views of its dealer and contractor cus-
32774 tomers because it has to rely on their regular business. Government business is spotty and never results in what can be called 'having a customer'—that is, a regular year-in and year-out customer.

"Importance of the Dealer in the Marketing of Cement.

"The dealer is Lone Star's most important customer. The percentage of business that Lone Star sells through its dealers varies from 60 percent to 90 percent at its

various mills, depending on the location of the mill and the amount of government work which is being done in the particular area at the time. Some marketing areas are particularly strong dealer outlets. For example, in Texas and Kansas the percentage of dealer business is very right. In 1938, at its Norfolk mill, Lone Star sold over 60 percent through its dealers; in Kansas about 90 percent, and at Hudson and in Texas, over 80 percent. Lone Star considers the dealer to be the backbone of its business. The importance of the dealer has had a tremendous influence on Lone Star's marketing methods and policies. Lone Star is confronted with a constant necessity for preserving dealer outlets, for fostering the dealer's goodwill, and giving him a price and terms that will enable him to compete with other dealers selling in the same consuming area.

"Policy with Regard to Diversions in Shipment.

"Lone Star has always sold its cement subject to the condition that the buyer would not divert it in
32775 transit. The reasons for this policy are that diversions by a consignee may permit him to secure a lower cost than other customers of Lone Star at the point to which the cement is diverted, and bring about a discrimination to the detriment of such customers. Also, such diversions, to the extent of the volume involved, in many cases deprive Lone Star of an opportunity to sell cement at the destination to which the diversion is made at a higher mill return."

HARRY C. KOCH thereupon resumed the stand and testified further as follows:

By Mr. Brick:

Q. Mr. Koch, do you recall Executive Order
32776 6767, which was issued by the President during the N. R. A. Code period, which permitted bidding on federal jobs up to 15 percent below prices filed with the Code Authority? Do you recall that?

A. I have a recollection that there was such issued, but my recollection, I thought, was 15 cents—I may be wrong—rather than 15 percent.

Q. Well, will you explain the conditions or the factors

which caused you not to give a lower price to the Government?

32777 A. Well, any lower price that you would give to the Government, in my opinion, might have been considered a quantity discount. We were not giving that to our general trade. We did not feel the prices we were asking were too high. And certainly any concession we would make to the Government would react by similar requests by the dealer trade and the contractor trade.

32778 Q. Is it any cheaper, Mr. Koch, to sell cement to the Government than to your other customers?

32779 A. In theory, yes; in practice, no.

Our outlay for our sales organization is the same; there might be a saving shown there per unit cost of selling.

Q. Was there any agreement or understanding 32780 between your company and any of your competitors?

A. On what?

Q. Relating to not taking advantage of the provisions of the President's order?

A. None.

Q. Did you know at any time whether your competitors were going to take advantage of the order in their bidding; that is, prior to the time that the bids were made public?

A. We did not.

32782 By Mr. Brick:

Q. Well, in your experience, Mr. Koch, have you had situations where you offered prices to State and county governmental agencies, such prices being below your commercial prices?

32783 A. Well, I recall that we have had them to governmental agencies, or departments, and to States. At the moment, I have no recollection of having them to counties.

By Mr. Brick:

Q. Well, in the cases where those situations did exist, Mr. Koch, was your company the low bidder?

A. We have been low bidder on State lettings, and we have been low bidder on U. S. Government lettings.

Q. And in the cases which we are discussing, and which you have in mind, did your company obtain the awards?

A. Not the award that we were entitled to. We—

Q. What happened in those cases?

A. Well, several occasions the bids were all thrown out and re-advertised, or there was some private negotiations entered into between the buyers and some of our competitors.

We were given some awards, not for the entire quantity that we bid on, or were low on; and in the other governmental instance, why, on the second call for bids, we were underbid, so that we received none of the award.

32793 By Mr. Brick:

Q. Mr. Koch, will you state factually the reasons for you applying a policy of using a minimum mill net with respect to the State bids which I have mentioned?

32794 A. Well, some of the points carry prices that would net us below the minimum return that we were willing to accept at our mill; some of the proposals indicated that we would not get the same consideration if we did not bid at all points as those who did.

32796 The witness identified Resp. Ex. 2353-A to F as a proposal covering the bids which were received on November 24, 1931 for the State of Iowa; Resp.

32797 Ex. 2354-A as a proposal from the State of Louisiana calling for bids on August 19, 1929; Resp. Ex. 2355-A as a proposal from the State Highway Commission of Missouri, calling for bids on October 10, 1931. He recognizes those as the proposals received. He did not see the bids, but he would say that Lone Star submitted bids.

32800 (RESP. EXS. 2353-A to 2353-F, 2354-A to 2354-K, and 2355-A to 2355-O, were offered and received in evidence.)

By Mr. Brick:

Q. Now, was your policy, Mr. Koch, in connection with using a minimum mill net in connection with some of your State bids predicated upon the requirements contained in proposals such as those which we have discussed?

A. Oh, yes.

Q. Were requirements of the kind contained in these proposals typical of requirements in other proposals?

A. Yes, I would say they were.

32801 Q. Now, other than the purposes which you have stated, Mr. Koch, did you have any other purposes in mind in bidding at all the points in the manner that you have explained; that is, at some points bidding a price

which would have been higher than the commercial price at those points?

A. Yes. There was another point in some of these proposals providing for cement that was to be shipped to destinations on which—which were not listed in this proposal, the stipulation being, as I recall, that they could add the additional freight to some point nearby, so that it would follow if we wanted to protect that minimum, and not be called upon for a large quantity, or any quantity of cement, they would not give to us the net return that we were trying to secure.

Trial Examiner Norwood: Well, if he required delivery at more distant points, and made you the allowance of the difference in freight, would that reduce your net return?

The Witness: If it happened to be, Your Honor, a point where we did not want the low net, we, naturally, trying to preserve a net realization to us, or a minimum, 32802 you might say the floor—

Trial Examiner Norwood: Why wouldn't you want the low net at any particular point?

The Witness: Well, because it was not attractive to us.

Trial Examiner Norwood: Interfered with your dealer trade, or something?

The Witness: No, no, no; it was less than we cared to take for our product.

Trial Examiner Norwood: Well, why?

The Witness: Well, we don't want to give away our product. We are in business for a profit.

Trial Examiner Norwood: Well, you were willing to sell at a given mill net at one point.

The Witness: Yes.

Trial Examiner Norwood: And not willing to bid further and have freight allowance adjusted so as to give you the same mill at this other point?

The Witness: No, if we had a bid at this point at a price that would have been unattractive to us from the net realization at our mill, then they could have taken it on to some other point and only added the freight; therefore, we set a minimum which we would accept, and this is one of the reasons—or had weight in arriving at that decision as well as the quantity that was shown at the destination.

32803 Trial Examiner Norwood: In other words—

The Witness: I don't know—

Trial Examiner Norwood: In other words, in order to cover the field, you were willing to make the concession as to a few points to balance it up in sales to other points?

The Witness: Well, I am willing—

Trial Examiner Norwood: But you did not want these concessions extended there so as to bring about a loss of balance as between your average prices; is that it?

The Witness: Well, I think you have the—what is going around in my mind and what was our policy in part—we did not want to place ourselves in a position where this State could award us all of the thin business and not give us what, in our parlance, we would say was some of the gravy.

Trial Examiner Norwood: That is what I meant.

By Mr. Brick:

Q. You mean by "gravy," Mr. Koch, business on which you could earn a profit?

32804 A. Well, we have been at where we did not earn profit under different conditions; but it would be business where we would expect a return in keeping with the conditions under which we were bidding.

Trial Examiner Norwood: I think that he has gone into the subject fully, and I sustained the objection because he had covered it, and covered it, I think, twice, and amply.

32805 Q. Mr. Koch, in general terms, and briefly, state the reasons why it was necessary for your company to use a minimum mill net in connection with its bidding in these situations which we have discussed.

32806 A. It was entirely our desire to protect our interests by not taking business below the net realized which we wished to secure, and at the same time qualify our bids so that we could secure an award.

Q. Was it in any way your purpose, Mr. Koch, to bid in the manner which would make you low at certain points, and your competitors low at other points?

A. Absolutely not.

Q. Have you ever followed such a purpose in connection with any bids?

A. No, sir.

By Mr. Brick:

32807 Q. In connection with the special prices which you mentioned, Mr. Koch, and which were made by your competitors from time to time, did you meet such prices wherever you picked them up in the field?

A. We do and we don't.

Q. Now, under what conditions do you meet such special prices made by your competitors? And by "special prices" I mean prices which are lower than their published quotations for the same points.

32809 Mr. MacIntyre: Now, if Your Honor please, we do object to any further questions and answers of that type. The witness has answered those questions—unless they now attempt to impeach the witness and claim surprise. He told us on Friday, and put in documentary evidence showing as to the only instance previous to '37 and '38 that he knew in which he had made a special price. That is in evidence, documentary evidence here, if you please.

Now, he says again in 1937 and 1938 they made a special price somewhere down in the Southeast, Mississippi somewhere. Now, they are trying to go over the same ground. Evidently they did not get the answer they wanted before. If they want to claim surprise, and claim a hostile witness, let them go to it, and let us know what they are trying to do here. Let the record show. I cite again the record of Friday afternoon.

Mr. Leisure: What page?

Mr. Brick: If Your Honor please, I do claim surprise, and my surprise has to do with Mr. McIntyre's statement, that the witness was confined only to two or three instances of special prices. Now, Mr. MacIntyre knows as well as anybody in the industry that that is not the case.

Trial Examiner Norwood: I think that he may
32810 answer that.

And I want to state to the Counsel that he is assuming some responsibility here when he continues to duplicate. If he is so doing, the record is going to show it.

Mr. Brick: I am satisfied.

Trial Examiner Norwood: And if this thing continues I am going to take appropriate action about it, because I do not thing that this hearing should be permitted to drift into what such procedure would cause it to drift into.

Mr. Brick: I can appreciate that, Your Honor. And I think that if Your Honor does make reference to the record you will find that the claims of duplication made by the Government come up only in connection with matters that they do not want to see in the record as a matter of defense.

32811 A. It is purely a matter of judgment how it affects our general business: Namely, if we find that it is hurting us and taking certain customers from us, why, it is only natural that we have to find some way to protect what we consider our interests.

By Mr. Brick:

32812 A. And what way did you take, Mr. Koch?

A. Well, we have taken various ways.

Q. Will you explain?

A. There is no set way.

In the State of Texas we felt that we had lost most of the highway contractors' business.

32813 Q. You have testified that you meet these special prices of competitors under certain conditions, and you explained the conditions.

Now, in meeting those prices do you lower your various base figures at your mill, or do you meet them regardless of your base figures?

A. We have done it both ways.

32815 Q. Now, Mr. Koch, you rely on your experience in the cement business since 1905, and tell us factually and in general and brief terms and various forms and types of price concessions which have been made by your competitors and which result in a price to a customer below the quoted price published by that competitor.

A. I have in my experience found that they are sold below their published price. I have found that they have included additional cement in the car. I have found that they have made no charge for bags. I have found that they have extended discount dates. I have found that they have made sand and gravel arrangements with an outsider. I have found that they have made adjustments of what, in my opinion, were fancied claims for shortage, for quantity, for poor bags. All of which to me mean that they were using methods which they did not

32816 publish.

Trial Examiner Norwood: Giving advantages that were reflected in price, substantially?

The Witness: They all figured back to price, Your Honor.

By Mr. Brick:

Q. Now, when you spoke—

A. Might I add to that before—

Q. Yes. Go ahead, Mr. Koch.

A. I have found that they either donated or provided storage bins; that they may have even—no. I will eliminate that "may"—that they have even assisted in financing, through banking connections, have purchased bidding blanks; where charges have been asked for them; and have paid bond premiums.

Q. Now, when you spoke, Mr. Koch, of sand and gravel arrangements, which are made for the purpose of giving the buyer the better than the published price, just what did you mean? Will you explain the nature of such arrangements?

A. Yes.

The cement company makes arrangement with a sand and gravel producer to give a favorite contractor a certain price. The cement company makes up the deficit to the sand and gravel producer if he shows any loss, or to make up, so that he gets a profit.

Q. Now, you also made reference to arrange-
32817 ments that are made by way of rebate. Would you explain from your experience how that kind of an arrangement is developed?

A. I have found by being shown the evidence that material is invoiced at the published price, and that settlement is made at a price lower than the published or invoiced price, and that sometimes refund checks are sent to the buyer, which I consider a rebate.

32818 By Mr. Brick:

Q. Now, for how long have practices of this character continued through your experience?

A. Well, they have been prevalent in one form or another ever since I have been in the business.

Q. And when you obtain information of that kind do you meet the situations and rely on the information concerning the special prices which comes to you?

A. Not always. At certain times, we do.

Q. As far as your testimony is concerned, did I understand you correctly or incorrectly as confining these various practices to situations which you knew about and which have continued throughout your experience?

A. Yes.

32819 Q. Have you found in your experience, Mr. Koch, that conditions of this kind are more extensive or less extensive in times of dropping demand?

A. Well, we always feel it more at that time, and they come to our notice more, so on that basis I would say there was more of that at that time than under times when business was good.

Q. Well, take, for instance, what was the situation in 1927, 1928, when the record shows there was a larger demand?

A. Well, there were times during '29, '28, the latter part of 1927, when we could ignore most of those things.

Q. Well, with respect to their existence, did I understand you correctly that such practices did prevail at that time?

A. Oh, yes. They always prevail.

Q. What has been your experience, Mr. Koch, with regard to whether or not manufacturers have a chance of keeping special prices secret?

The Witness: Let me have that again.

(Last question read.)

Mr. MacIntyre: That is objectionable. He would not know if they were secret.

Trial Examiner Norwood: I sustain that objection because any further evidence on that matter is cumu-

32820 lative. We have covered it fifteen or twenty times.

Mr. Brick: Well, I offer to prove in that connection that oftentimes prices remain secret when made by a particular competitor, and that often depends upon the relationship between the seller and the dealer or contractor buyer; and there are other occasions when prices are not concealed, that is, special prices, for a great length of time; and that there are times when secret prices reach the point of being effective in selling cement, so that other competitors are losing business in a particular market; and that by reason of that manufacturers know that there are prices in the field which are lower than published prices.

Trial Examiner Norwood: You have offered evidence

to show that those prices can't remain secret very long. Secrets always come out. And I don't think there is any testimony to controvert that up to this time.

32822 Q. In your experience, Mr. Koch, have you found that secret prices are given secretly to buyers in particular instances, and that such prices remain secret for some time?

A. Oh, yes, sometimes it requires months and maybe a year, or more, to develop just what is going on.

32823 Q. Does the Lone Star Company give any personal favors to its buyers as an inducement to them to purchase the Lone Star product?

A. Well, we do what we consider that; we do advertising; we have got a very good service department, and we have very good operators.

Trial Examiner Norwood: Well, do you give any special allowances or services?

The Witness: We give no special allowances. We give services, designing mixes, making a study of cement problems, and assisting him from a technical standpoint in every manner that we can.

By Mr. Brick:

Q. Are there any other illustrations of favors which the Lone Star Company gives to customers?

A. Well, we might entertain a man at a ball game,
32824 or take him to a theatre.

32825 Q. Mr. Koch, do you ever furnish lists of base figures to any of your competitors?

A. No.

Q. Have you at any time obtained lists of base figures from any of your competitors?

A. No.

Q. Do you know of any instances where Lone Star initiated price increases which were not followed by competitors?

32826 A. Oh, yes.

Q. By way of illustration, will you explain the circumstances with regard to some such situation?

A. Well, in—

Mr. Wooden: Your Honor, it was covered by Mr. Neylan in New York.

Trial Examiner Norwood: What is the use of going into that again?

Trial Examiner Norwood: I think that I will exclude

that. I think that it has been covered with respect to this company. I think that you put in abundant testimony from various respondents on the subject.

Mr. Brick: Well, I offer to prove in that connection that the Lone Star Company increased prices by
32827 quoting price advances to its trade in March of 1933, and that those advances were not followed by the competition; that it was necessary for Lone Star to recede from its position and to sell at its old price rather than the advanced price; and that similarly Lone Star had other such situations; for instance, one in which it increased the sack charge from 10 cents to 15 cents, and none of the competition followed, and it was necessary for Lone Star to continue the 10 cents' sack allowance.

There are other such instances, but for the purpose of the offer I will be content with those two.

32828 By Mr. Brick:

Q. Have there been cases, Mr. Koch, where competitors of the Lone Star Company initiated price advances which the Lone Star Company did not follow?

A. Yes.

Q. Has the Lone Star Company always had a definition of a dealer since you have been with the company?

A. Yes, in some manner or other.

Q. You have a pamphlet issued by the Lone Star Company entitled "Trade Ethics and Marketing Policies." Are you familiar with the statement concerning a dealer which is contained in that pamphlet?

A. Yes.

Q. Is that the description of a dealer which the Lone Star Company has usually applied?

A. Yes, as closely as we could.

32829 Q. And did you use a similar definition before the pamphlet was issued in 1927?

A. Oh, yes.

Q. What was the purpose, Mr. Koch, of having such a definition?

A. Well, you have to draw a line somewhere and make that line fit the community.

Q. Well, will you explain the various reasons which you have had in mind in connection with applying that definition, and the reasons for following it?

A. Well, you have to have an outlet. That was very

well explained in our dealer policy which becomes a part of that pamphlet. We must temper our definition of a dealer according to the locality. We must afford him protection, otherwise he will not stock our articles, neither will he favor our company with his purchases.

32833 Q. Mr. Koch, have you had any agreement with any dealer or dealer associations which in any way related to the definitions of "dealer" contained in your pamphlet, or with regard to any application of any definition of a dealer which your company has followed?

A. Not with an association. Now, I might have said to a dealer at a certain town, in looking over the situation here as to the requirements of that town, "I consider your a dealer."

By Mr. Brick:

Q. Yes, sir.

32834 Now, in connection with the definition appearing in your pamphlet to which we have referred, has that definition been applied by your company since the issuance of the pamphlet?

A. Oh, as well as you could express it even before and after the issuance of the pamphlet.

Q. Well, now, do you apply it differently in different sections of the country?

A. Yes, you have to place a different interpretation on it, depending upon the locality.

Q. And do you find that conditions in various markets change so that from time to time you have to apply it differently in the same market?

A. Correct.

Q. Do you ever sell a dealer for a delivery outside of the community where he has his warehouse?

A. We endeavor to restrict deliveries to him to the community either where he has his warehouse or a territory surrounding that that he normally serves.

32836 By Mr. Brick:

Q. Prior to the luncheon recess, Mr. Koch, we were discussing the different applications you had made with regard to your general definition of "dealer."

Now, can you give us some of the examples of those variations in application?

Trial Examiner Norwood: I think he has already told

us that it did not make any difference in certain
32837 circumstances, where it was a small town, whether or not he had dealers, and so on. Why go into that question?

Mr. Brick: Well, I do not propose going into that question, Your Honor. I hoped to bring out the circumstances on Mr. Wooden's statement that this is a factual matter in controversy.

Trial Examiner Norwood: Well, isn't it conceded that he has a right to apply his own definition of a dealer in any way he wishes, or to modify or to disregard it?

Mr. Brick: Well, I certainly do.

Trial Examiner Norwood: You just asked him how he applies this idea he has of a dealer, and I cannot imagine how it can be relevant in any possible particular whatsoever.

Mr. Brick: Well, I am inclined to agree with Your Honor on that, too, but the difficulty is this, that the Government says that this company and other companies adhere to a rigid definition of "dealer."

Trial Examiner Norwood: Yes, and he testified that he did not.

Mr. Brick: Well—

Trial Examiner Norwood: I am going to exclude that and ask the Counsel to go on.

Mr. Brick: In that connection, I offer to prove, if permitted so to do, that the Lone Star Company has
32836 sold cement to trucking concerns, undertakers, wholesale grocers, sawmills, and other buyers who do not come within the usual category of "dealer"; and I propose to prove through this witness the specific occasions relating to those classes of sales.

Trial Examiner Norwood: Yes.

Mr. Brick: Now, shall I continue with the offer that covers the entire line, Your Honor? I am not quite sure that Your Honor desires to take any testimony on this subject, or whether your suggestion pertains—

Trial Examiner Norwood: Complete your offer.

Mr. Brick: All right, sir.

That the Lone Star Company sold to such classes of buyers because in many cases they sold other building materials, and in their communities were considered in the business of retailing building supplies; and the company does not follow any rigid rule with respect to the application of the definition of "dealer" contained in its

pamphlet, but considers the circumstances of each dealer individually and decides whether or not to sell him on the various factors relating to his business.

That completes my offer of proof.

Trial Examiner Norwoood: Yes. All right.

Proceed.

Mr. Brick: All right.

32839 Trial Examiner Norwood: You may have an exception on that.

By Mr. Brick:

Q. Mr. Koch, in selling to dealers, does your company require that dealers be members of dealer associations?

A. No.

Q. Do dealer associations, or have dealer associations, at any time, dictated to your company as to who should be recognized as a dealer?

32840 A. Well, there were endeavors to influence us in various manners at times in practically every territory where we operate.

Q. Now, does such a situation, or such request on the part of dealer associations, influence your company to any extent in determining whether you will sell to somebody as a dealer?

A. No, if such dealer mentioned things to us, and he happened to be one of our customers, we might give it weight in our decision, but very little weight.

Q. Do you make inquiry of dealer associations to ascertain whether dealers are members of associations?

A. No.

Q. Have you found, in your experience generally, Mr. Koch, that competitors do or do not sell to dealers whom you recognize as a dealer?

A. I have found both that they do and they don't; and I might add that the reverse is true.

Q. Does the fact that one of your competitors is selling a particular buyer as a dealer influence your decision as to whether or not you might sell that same buyer?

A. It might at some time after we had time to 32841 observe the effects of what they were doing on the rest of the trade.

Q. Now, have your policies with regard to your relations with dealers in any way been the result of conferences or discussions with any of your competitors?

A. No.

Q. Has Lone Star ever had any agreement or understanding with any dealers or dealer associations in connection with any of these policies?

A. No.

Q. Well, with respect to your Dallas mill, Mr. Koch, have you ever delivered to trucks from that mill?

32842 A. Yes, we did.

Q. When did such deliveries begin?

A. When I came to Dallas in 1918 I found that the company owned one 2½-ton truck in which we offered to make deliveries for 10 cents a barrel in certain parts of the city. There wasn't much cement that moved that way then; but in 1920 there was both a car shortage and an oil boom that clogged the rails of the T. & P. Railroad which served us, so that we either could not get enough cars to load or if we did get them the railroad could not move them.

32844 A. (Continuing.) Therefore we offered the trade
32845 to load their trucks if they would come to the mill, or we would employ trucks, if possible, to take cement from our mill to the team tracks in the City of Dallas and load cars.

From thence on we delivered to trucks calling at our mill and continued to do that up until about 1927 or '28, at which time we employed a trucking company to do all the trucking. That continued up to '32 or '32, when the State Legislature of Texas enacted a law that limited the size of the truckloads to 7,000 pounds, whereas they had been hauling 14,000 pounds before.

The trucking company, naturally—or, the trucking company demanded additional compensation, so that we discontinued the trucking entirely, the car movement into the city being the cheaper and the most desirable.

By Mr. Brick:

Q. Now, Mr. Koch, with regard to the deliveries which you made to customers' trucks, you mentioned a 10-cent charge per barrel. Now, will you explain the manner in which you arrived at the price which you charged in connection with those deliveries? That is, the charge for the cement.

A. That was for the delivery in the town.

Trial Examiner Norwood: You delivered to the customers' trucks?

The Witness: Without any charge at our mill base.

Trial Examiner Norwood: Just quoting f.o.b. mill base?

32846 The Witness: Yes, it was our mill base. "Come and get it."

By Mr. Brick:

Q. And what did you do with respect to the deliveries which you made in your own truck?

A. Well, we charged 10 cents a barrel, which we figured was the charge it cost us. We found it cost us more. As I recall, it was damaging the trucks, and we were glad to employ outside trucks in the final wind-up.

Q. And as a result of the situation which you said occurred in 1927 or 1928, did you terminate trucking?

A. It finally terminated trucking, yes; but I think it was '32 or '31 at Dallas.

Q. Now, how long did that situation exist, Mr. Koch?

A. You mean stopping trucking?

Q. Yes, sir.

A. Well, it never trucked since, or delivered to trucks.

Q. Thereafter did you do any trucking at all in Texas?

A. Yes.

Now, at Houston was a condition in which we were doing no trucking, or making few, if any, deliveries to trucks when they called at our mill, until 1927 when the Trinity Portland erected a mill several miles closer to the heart of Houston, and they gave notice that they would deliver to trucks at a mill price, or mill base, or would ship in
32847 carlots any place in the city at 10 cents higher than that price.

32850 Q. Mr. Koch, in adopting the various policies relating to trucking, did you take into consideration the attitude of dealers?

A. Oh, yes, certainly.

Q. Now, what did you find to be the attitude of dealers with regard to the various policies relating to trucking which you adopted?

A. When this competing mill was established they opened it to trucking. They were that much closer to the business part of town. We met it, not by trucking it from our plant, but by opening up of a city warehouse. We switched our cars by railroad up to that warehouse,
32851 and we equalled the condition that had been created. That was in 1927.

In 1928 the Houston dealers approached us and wanted us

to cease trucking. We contended that we had not started. However, to see whether or not they would continue to give us business, we sent out notice and stopped trucking. Some four months later the Trinity Company sent out notice that they also ceased trucking.

32852 Q. Now, how about Dallas?

A. Well, when we ceased delivering to trucks our competition also ceased, and there has been no trucking since.

Trial Examiner Norwood: About what time was that?

The Witness: Dallas?

Trial Examiner Norwood: Yes.

The Witness: Houston was 1929. My best recollection is that Dallas was 1931.

By Mr. Brick:

Q. Now, I do not want to cover all of your mills, Mr. Koch, but tell us about your trucking situation with respect to the New Orleans mill.

A. The New Orleans mill was brought into existence in 1927. We offered to serve trucks. There was very little that was taken from the mill that way, and the
32853 dealers said they preferred not to be served in that manner, so that in two months we sent out notice that we would make no—no more deliveries to trucks calling at the mill.

32854 Q. Did you say that the trucking was terminated with regard to your New Orleans mill in 1928?

A. Yes.

Trial Examiner Norwood: Did you have similar experience with your other mills?

The Witness: We never had any trucking at our Birmingham mill.

Do you wish me to enumerate some of the others?

Trial Examiner Norwood: No.

By Mr. Brick:

Q. When you terminated trucking from your New Orleans mill, did you send out announcements announcing that fact to the trade?

A. When we terminated delivering to trucks at our mill?

Q. Yes, sir.

A. Yes.

32855 The witness identified Resp. Ex. 2356 as a copy of the Lone Star announcement, dated February 25,

1928, to the trade. Ben F. White, who subscribed to Resp. Ex. 2356, was at that time sales manager of Lone Star's Louisiana Portland Cement Company. The announcement was sent out under the witness' authority. Lone Star did not resume the practice after that date.

(RESP. EX. 2356 was offered and received in evidence.)

32856 By Mr. Brick:

Q. Has the Lone Star Company ever delivered to trucks at its Spocari mill?

A. I have no recollection of any deliveries to trucks at that point.

Q. How about Norfolk?

A. We offered to deliver to trucks at Norfolk at the city price, but that was discontinued along about 1932, or thereabouts.

Q. When had you started trucking at the Norfolk mill?

A. In 1926.

Q. And under what circumstances did you terminate it?

A. Oh, it was not found desirable, from bothering at the plant, and the time the trucks would call, and the mixing between—or deterring the workmen in their work as between loading trucks and loading cars.

32857 Q. Did you find that there was any great demand on the part of customers to take delivery in trucks?

A. Not that I recall.

Q. Now, suppose you group the rest of the mills, Mr. Koch, and what would you say with respect to trucking as to your Nazareth, Hudson, Lamedale, and Bonner Springs plants?

A. Well, it was all handled in a different manner. At Nazareth there was very little trucking from our plant. There was a fair percent at our Hudson plant for a year or two. At the Indiana plant I don't think there was much—I don't recall that there was much trucking other than for a year or two. At Bonner Springs there was very little.

Do you wish me to say what charges we made there?

Q. Yes, sir.

A. In the case of Nazareth and Hudson there was a short period in which we charged 15 cents over our mill base.

Trial Examiner Norwood: What time was that?

The Witness: I would say that was 1929, 1930, and perhaps 1931.

A. (Continuing.) We never charged over our mill base, as I recall it, at Limedale. We really charged at that mill the destination price and allowed the freight.

Trial Examiner Norwood: Yes.

A. At Bonner Springs, Kansas, we sold at the mill base for a year or two, say, 1924 and 1925; then we sold
32858 some at a destination price with freight allowed, and then we sold some at 15 cents above the mill base.

We discontinued the trucking at Nazareth and Hudson, N. Y., according to my recollection, in the early summer of 1932. We discontinued it several months later at Limedale, Ind., and perhaps a year or more later at Bonner Springs, Kansas.

Q. Now, you refer, Mr. Koch, to trucking being a nuisance. Will you develop the facts which caused it to be a nuisance?

A. Well, most of our experience came from around Dallas and points. Trucks were of unequal size, they did not fit the platform; some were high, some were low; they insisted that our men truck it onto the trucks and stack it for them; our plants had been equipped otherwise for car loading.

We tried to meet the trucking condition as best we could. The truckers would come all times of the day and at night; they generally employed the cheapest truckers they could find; there were claims for shortages, claims for damage in transit, and if the truck belonged to the dealer he kicked if the truck was delayed because there were other trucks in ahead of him, and many of those little problems, so that it was found quite undesirable.

Q. In what way, if any, did the delivery to trucks interfere with the operation of your loading crews?

32859 The Witness: Well, Your Honor, our plants generally were equipped with a small pack house, with machines, and railroad tracks; arranged so that there would be a minimum truck—or belt conveyor to the car. Naturally you could not put a truck onto the railroad track. You had to handle it round the end of the pack house somehow or other. And then you had to have an outside platform. You created more trucking and more handling, and you had to put a checker or two on the platform, not only to check onto trucks but to get receipts from the trucks for what they took.

By Mr. Brick:

Q. And how about the hours of your loading crews and your pack house crews?

A. Well, many of the labor troubles have originated in the department once it was opened to trucking. The trucker may and may not be engaged in hauling other material. It is often the case that he is a livestock trucker, or he is a meat trucker, and actually he wants to suit his convenience, and his convenience does not suit us; so he calls all time of days—of the day, nights, not infrequently on Sunday.

Q. Did you or did you not find that deliveries to trucks interfered with carloadings?

32860 A. Oh, it had to. You couldn't divorce the two, unless you built separate establishments.

Q. Ordinarily, was it the practice of your company to have the loading and packing house crews available for work in the evening?

A. Oh, no. Oh, no.

Q. How about Sunday?

A. Well, neither Sundays. Especially is it today. You have got the labor laws.

Q. And what was the situation at the time you did permit deliveries to trucks at the various mills?

A. Well, packing is a hard dirty job, and those men need rest. You can't go to work and be on call at all hours of the day and night. In fact, during the busy years there the number of packers that were suitable was quite limited.

32862 Q. Now, what was the situation with regard to the hours of your packing crews and loading crews while you were permitting deliveries to trucks, as compared with the time when you were only making deliveries to cars?

A. Well, in making deliveries to cars you can generally end your work at 4, 5 o'clock in the pack house. You can't do that if you are making deliveries to trucks.

Trial Examiner Norwood: Why not?

The Witness: Because they come at other times. Then they think that you are discriminating against them

32863 if you do not serve them.

Trial Examiner Norwood: Why?

The Witness: Well, they can find more excuses than anybody why they were delayed. They had a puncture—

Trial Examiner Norwood: Don't you close your sales department at certain hours of the day?

The Witness: Not at noon hours.

Trial Examiner Norwood: At any time?

The Witness: We endeavored to, Your Honor, but there is no limit on the hours.

Trial Examiner Norwood: Isn't that regulated by rule? Don't you notify your trade as to the policy?

The Witness: It won't do.

Trial Examiner Norwood: It won't work?

The Witness: No.

Trial Examiner Norwood: All right.

By Mr. Brick:

Q. Did you try that, Mr. Koch? Did you have certain conditions imposed with regard to the deliveries you made to trucks?

A. We have endeavored to do that.

Q. And how did it work out?

A. It did not work.

Q. Do you use conveyor machines at your various mills for the purpose of loading cars?

A. Many of them, yes.

32864 Q. And were you able to use those conveying machines for loading trucks?

A. Oh, no.

32865 Trial Examiner Norwood: Objection sustained.

Mr. Brick: I offer to prove—

Trial Examiner Norwood: Now, there is no use offering to prove. He has already told us. Do you think if he tells us twice it will be any stronger?

Mr. Brick: Well, I am not certain, if Your Honor please.

Trial Examiner Norwood: I am. I am sure. I will be responsible for that. There is no use putting in that offer of proof.

Mr. Brick: Well, how can you be responsible for that if I do not make an offer of proof?

Trial Examiner Norwood: Plentyways. Go ahead.

Mr. Brick: Well, I won't make an offer of proof on the instruction from Your Honor.

Trial Examiner Norwood: Off the record.

(There was a discussion off the record.)

Trial Examiner Norwood: That is excluded on the ground that it was asked and answered heretofore by this witness.

By Mr. Brick:

32866 Q. Now, Mr. Koch, was the discontinuance of trucking by any of the Lone Star mills the result of any agreement or understanding with any of your competitors?

A. No, sir.

Q. Was it the result of any agreement or understanding with any dealers' associations?

A. No, sir.

Q. Or with any railroads?

A. No, sir.

Q. Or with any individual dealers?

A. No.

Q. Do your permit trucking from your Washington warehouse, Mr. Koch?

A. Oh, yes.

Q. I think you have testified that your company has a silo in Washington, D. C.

A. We had a silo in the part of Washington, D. C., generally spoken of as Georgetown.

Trial Examiner Norwood: Are you referring to the present time or some past time?

The Witness: I am referring to 1930 and continuing.

Trial Examiner Norwood: Up to the present time?

The Witness: Yes, sir.

By Mr. Brick:

Q. Will you tell us briefly, Mr. Koch, the reasons
32867 of your company for establishing that silo?

A. We had since the establishment of the Norfolk plant, which began operation in 1926, endeavored to market our product—market the product of that mill in the District of Columbia and its environs. We had a very high freight rate by railroad to pay, as compared with our estimate of what we could do by water transportation.

We had been unsuccessful in getting much business out of Washington, and, therefore, set about to purchase property on the water front, erect a silo warehouse, and equip it for truck loading, transport our product in bulk from
32868 Norfolk to Washington and use the Washington warehouse for our deliveries as well as for additional storage of our Norfolk finished product.

Q. Now, have you made deliveries from your Washington silo both by truck and by rail?

A. Practically all by truck; some small amount by rail, where it could be handled by rail.

Q. Is it on a railroad siding?

A. It is on the B. & O. Railroad siding, with a track on our property.

Q. When did you begin to use the railroad siding for car shipments?

A. I don't think, other than for switch service, pushing down toward the Smoot yard, that we used it for rail deliveries for two or three years after the plant was in.

32869

Q. Now, did the transportation of your product from Norfolk to Washington by water give you an advantage over your competitors who were selling their product in Washington through rail deliveries?

A. Well, I don't know as I can say that it gave us any advantage. I could say this that from our estimated cost compared with what their rail rates were into Washington, yes.

Q. So, when, prior to the time that you shipped to your silo by water, relatively were you in a better or worse position than the other mills shipping into Washington by rail?

A. Oh, prior to the time—oh, we were in a worse condition.

By Mr. Brick:

Q. That is, worse than your competitors?

A. Yes, transportation-wise, sure.

Q. How is that situation changed,—or, in what respects was it changed by your erection of a silo and delivery of cement by water to Washington?

32870

A. Well, we could equal the competition in that part of Washington surrounding the warehouse and receive what we considered was an acceptable return at our Norfolk mill.

Q. Now, at the time you began delivering by truck from your Washington silo, did you find that that brought about a change in the practices of your competitors who were selling in Washington?

A. Oh, yes, it did, in almost every respect.

Q. What were the changes?

A. Well, some of them, at least the Rosslyn Steel & Cement Bulk Warehouse, some made arrangements to store

packed cement in contractors' or dealers' warehouses; some erected what you might call portable storage bins and warehouses to carry a certain amount of packed cement, the portable storage bins being for the delivery of bulk cement.

Q. What did you find with regard to the competition meeting your trucking policy?

A. Well, after erecting these storages or leasing these warehouses, they met our trucking competition and according to our thoughts exceeded it somewhat by being closer in.

32871 A. Well, K Street has no outlet on—I forget the direction—but up above the Q Bridge, you are down on the river level with the hill, and an abandoned canal between you and the street that crosses the Key Bridge. Therefore, to come to a warehouse you would come up K Street, going toward the Key Bridge, get your load, and then have to come back down again to get out to the different parts of the city.

What is more, the gravel bins are down on K Street, so that there is approximately, oh, five-eighths of a mile round trip from the gravel bin up to our plant and back, and the other bins and warehouses were located either close to the gravel bins or on the main city side of the gravel bins, so that they could serve without the trucks making the five-eighths of a mile, or whatever it was, round trip up K Street along the B. & O. tracks.

Trial Examiner Norwood: Well, going to the Georgetown side, over that way, wouldn't it be nearer, more convenient, then, for them to load at your warehouse?

The Witness: No, they would have to come back, I think, to the first street up the hill, if I recall correctly, that is Wisconsin Street—I am not so familiar with the names of streets around here, but I know about where they are; and it is a very steep hill.

32872 By Mr. Brick:

Q. Now, Mr. Koch, when you found that some of your competitors had warehouse space which was more advantageously located than your silo, what did you do?

32873 A. Well, we felt from our investigations that the rentals which might have been exorbitant, and be considered in the nature of a rebate, and the location of

these plants were about the equivalent of 15 cents per barrel; therefore, we entered into an arrangement with a large Washington dealer and made an allowance of that amount, to come to our plant and secure his cement.

Trial Examiner Norwood: What time was that that you made the allowance of 15 cents a barrel?

The Witness: I would say the first reduction we made was to get the District of Columbia contract, would be, to the best of my recollection, in the spring, perhaps March of 1931, and from thence out. The facts were given
32874 to the investigators of the Commission both by our company in New York and by our dealer in Washington, and formulated a portion of one of the reports that they made, whether it was the first or last one.

Trial Examiner Norwood: You mean that you made that allowance just to one dealer?

The Witness: That is right.

Trial Examiner Norwood: Then what was the price after making that allowance,—was that base price less 15 cents?

The Witness: It was a published price in Washington, less 15 cents.

Trial Examiner Norwood: What was that made up of?

The Witness: The 15 cents?

Trial Examiner Norwood: No, the published price in Washington.

The Witness: The published price at that time in Washington either was based on Union Bridge, Md., or the Lehigh Valley, or was a special price for Washington,—I can't recall just which.

Trial Examiner Norwood: Yes.

32875 By Mr. Brick:

Q. Now, in addition to giving concessions, did you engage any other warehouse which was closer to Washington—that is, the center of Washington?

A. Since that time, and some three or four years ago, the Smoot Company at their Southeast location—I can't give you the street name down there—erected some of these steel bulk bins, and leased them to cement manufacturers for so much per year, plus their service charge for making deliveries of bulk cement.

32876 We leased one or two bins Southeast. About two years ago the same Smoot Company at their George-

town location put in similar bins, and we leased them on similar terms and conditions, and trucked—or employed a trucker to haul bulk cement from our silos to the bins I have just described in Southeast, and in Georgetown, up to the Smoot gravel bins.

Trial Examiner Norwood: Well, regarding that 15-cent allowance made there, did your competitors meet that?

The Witness: Well, Your Honor, I feel the other way about it. I feel we were meeting what they were doing, in another way.

Trial Examiner Norwood: Did they ever meet that?

The Witness: Well, I always felt that they did that before I met that condition. In other words, two or three of them, and I have learned something from this testimony since it has gone in, rented this Rosslyn Steel & Cement warehouse, and—one company rented,—I think it was called the Blue Diamond Mortar Company's warehouse, or something; another company rented a contractor's warehouse; another company—no, a Washington dealer built a bulk warehouse, and a manufacturer immediately rented that from him, and, so far as I know, since then the manufacturers really purchased that from him.

Trial Examiner Norwood: Well, when you made
32877 that allowance, though, of 15 cents, I want to understand so I can understand your other testimony as you go along here.

The Witness: Yes.

Trial Examiner Norwood: There was a rebate off of the going Washington price, wasn't there?

The Witness: That is right. The published Washington price.

Trial Examiner Norwood: Yes, the published Washington price, that was $2—then you allowed 15 cents off of that, making $1.85?

Now, did the other people, more advantageously located, continue to sell their customers at the going Washington price of $2, or did they meet your price by selling at $1.85?

The Witness: I think— Now, let me bring you back to that: I made no move on that until I had satisfied myself through questions and investigations that they paid this man too much for his warehouse, or that they paid this dealer for the use of his new bulk warehouse, or they kept the cement in this contractor's warehouse, so in reality the contractor had it in his warehouse and could take it out, and I arrived at my 15 cents, that that's what it meant

to all of these, and I put—then I invoiced my dealer at the quoted price.

32878 Trial Examiner Norwood: Yes.

The Witness: And gave him a refund on settlement dates once or twice a month of 15 cents a barrel off of that invoiced price.

Trial Examiner Norwood: And what did your competitors do after that?

The Witness: What did they do after that?

Trial Examiner Norwood: Yes.

The Witness: Well, about—

Trial Examiner Norwood: Did they continue to sell at the Washington price—

The Witness: Well—

Trial Examiner Norwood: —with these special considerations you are talking about?

The Witness: Yes, and what they were giving.

The next move was that I happened to be in Washington when a dealer rushed to me—we were up at our Georgetown warehouse—and wanted to know what I was going to do about meeting a new price which someone had put into Washington. I told him that his was the first information I had on it, but we had this investment in Washington and the best way I could answer his question was if he did not think we were going to push it into the river.

32879 By Mr. Brick:

Q. Mr. Koch, you referred to arrangements which your competitors made in engaging warehouses in Washington, to put themselves in a position which would meet your competition, when you erected your silo.

Who were the competitors of the warehouses, or who are operating the warehouses which your competitors leased?

32880 A. The one warehouse; namely, the Rosslyn Steel & Cement Company warehouse, was rented by the Lawrence Portland, the Edison Portland, and, as I recall it, the Hercules Portland. The Blue Diamond warehouse was rented by the Penn-Dixie Company. The warehouse and bulk loading station that was built by Fries, Beals & Sharp was leased by the Capitol Company.

The Giant Portland leased a warehouse of a contractor—his name has escaped me for the moment.

The North American Company proceeded to put up its

own bulk storage in the Georgetown vicinity, as did the Lehigh Company.

32881 Q. And was it because of the arrangements that had been made between the manufacturers and these customers that you lowered your price to meet that situation?

32882 A. Yes, that is what I was trying to explain.

By Mr. Brick:

Q. Yes.

Now, did you have occasion, in connection with your operations, in Washington, Mr. Koch, to lease a warehouse and ship from the warehouse to trucks or deliver to trucks rather than to deliver to trucks from your silo?

A. Yes, I had. I did that with the Smoot Company at their gravel locations.

Q. Yes.

Did you make deliveries to any buyers other than the Smoot Company from your warehouse?

A. It is our cement. Smoot just warehouses and serves it for us, at an agreed—on an arrangement basis for us; but the invoicing and the sales are made by us.

Q. Now, after you began operations in Washington and made deliveries from your warehouse, did you at any time reduce the price of cement at Washington?

A. Well, for several years we were more or less awaiting developments as well as to get our bearings on cost, so that in the spring of 1937 we lowered our price in Washington 30 cents a barrel and took off the 5-cent warehouse charge that was on at that time; in other words, trucks coming to our warehouse received a 35-cent lower price than they had just previous thereto.

32883 Q. What was your purpose in reducing the price at that time, Mr. Koch?

A. Well, we felt we were not getting the business that we should considering the investment that we had. The market had been fluctuating up and down, and we had fairly well determined about what we could do, so we thought that was the opportune time to take this action.

Q. What was the result of that action, in so far as your sales in Washington were concerned?

A. Well, our business has increased. Some of our competitors have, so far as my reports indicated, not been quite so active in this market.

Q. Did you have more or fewer competitors in the Washington market since you reduced your price?

A. Well, I might, Mr. Brick, have the same num-
32884 ber of competitors, but I don't hear much of them, and I, therefore, would say we did not have as much competition, or activity, as we had before.

Trial Examiner Norwood: Did they meet your price?

The Witness: They have no alternative, Your Honor.

Trial Examiner Norwood: I see.

The Witness: If they want any of the business.

The witness identified Resp. Exs. 2358 A through O as photostatic copies of specific contract forms used
32885 by Lone Stars subsidiary companies or divisions
32886 from September 1924 to date. He thinks they cover all the forms, although he has not counted them.

Examination by Trial Examiner Norwood.

32890 These were used on the dates contained in the documents. That applies to all of them.

32891 (RESP. EX. 2358-A to 2358-O was offered and received in evidence.)

By Mr. Brick:

Q. Mr. Koch, at what points does Lone Star meet the competition of foreign cement?

A. I don't know—

Q. I might say encounter with foreign cement.

A. Well, I would say—well, all the way from Boston, Mass., down, principal ports of the Atlantic to the Gulf ports, ranging down to Brownsville, Texas.

32892 Q. Have the areas where you have encountered foreign cement changed and varied from time to time?

A. There are some points where it continues regularly, and other ones where it may continue for a couple of years, disappear, and then come back.

Q. Is Lone Star cement sold at a price higher than the foreign cement?

A. At the points where we come in contact with it?

Q. Yes, sir.

A. Yes.

Q. When did you have your first experience with foreign cement?

32893 A. Well, I would say 1905 or 1906.

Q. Where?

A. Galveston, Texas.

32894 Q. Did you find that the competition of foreign cement at that time was very great?

A. At which time, Mr. Brick?

Q. These early days, 1905, 1908, which you were discussing.

A. No. The consumption of cement was not so heavy in the United States at that time.

Q. When did the problem become acute?

A. The problem became very acute as it affected my company in 1925, and especially so in 1926.

Q. In what part of the country, Mr. Koch?

32895 A. In 1925 and 1926 it became very acute at Boston.

By Mr. Brick:

Q. What action, if any, did your company take to meet it?

A. We were repeatedly approached by the dealers for action. We took two methods.

Q. Will you explain them, please?

A. We put in a reduced price at Boston, and we also put out a notice that we considered an importer, user, handler of foreign cement a competitor, and would not sell him our product if he sold the other.

Q. Did your competition?

A. They followed our price but not our policy.

32902 By Mr. Brick:

Q. Mr. Koch, when did you start your policy of refusing to sell dealers who handled foreign

32903 cement?

A. My recollection is that the first letter to that effect that we put out was in November, 1926.

By Mr. Brick:

Q. Do you recall having any policy prior to that time?

A. We had the same feeling, although we had not announced our policy in public.

Q. Had you had any policy with regard to your companies—or your plants—located in Cuba and South America?

A. We adopted this policy over there and found that it benefited us, and naturally based—or, from that experi-

ence, we used it when confronted with the same condition over here.

Q. When did your policy along that line become effective in connection with South American and Cuban plants?

32905 A. In Cuba in 1922, in the Argentine in 1923 and 1924, Uruguay about the same time.

32908 Washington, D. C.,
Tuesday, February 20, 1940.

32911 CHARLES F. LEWIS was thereupon recalled as a witness for the Respondent, and, having been previously sworn, testified further as follows:

32913 *Cross-Examination by Mr. Wooden.*

32916 Mr. Wooden: I would like to ask if Mr. Smith is ready to produce the profit and loss statements, and balance sheets, of the Volunteeer Portland Cement Company for 1933 down to and including 1938.

Mr. Smith: I am ready to submit and introduce in evidence any of these documents that may be properly called for, if the gentleman will give us reasonable grounds, and point out what it is, that he desires and that it would be competent and material evidence, why, of course, they will be produced; otherwise, I would not feel justified in producing them.

Mr. Wooden: Your Honor, I call for their production at this time as a necessary basis for cross-examination of the witness regarding the testimony that he gave on direct with regard to the fairness of the prices made by his company on T.V.A. purchases.

Mr. Werle: Well, what testimony on direct with regard to fairness of prices? That is a pretty broad statement, in the first place.

Trial Examiner Norwood: Well—

Mr. Werle: And I think, first, we ought to have some showing as to just what Mr. Wooden's grounds are for asking for the profit and loss statements. This witness gave no testimony on direct concerning profits or
32917 earnings, or losses. He did talk about some cost estimates that he made in connection with negotiations with T.V.A.

Now, if Mr. Wooden will give us some specific evidence, some specific testimony, or some specific exhibits that he is talking about, perhaps we can come to some equal ground on it.

Trial Examiner Norwood: As I understand it, this witness gave testimony as to costs. Now, costs bear directly on the price, of the fairness of price.

Mr. Wooden: He put in—

Trial Examiner Norwood: And I think it is—

Mr. Wooden: Pardon me.

Trial Examiner Norwood: —merely part of a story; the remainder of the story being in possession of the Respondents, in possession of the company of which this witness is an officer. As I understand it, he wanted this for the purposes of cross-examination.

Is that correct?

Mr. Wooden: That is correct, Your Honor.

Trial Examiner Norwood: Yes.

Mr. Leisure: Well, we understand perfectly what he wants them for.

Mr. Wooden: All right.

Mr. Leisure: The question that confronts us,
32918 Your Honor, is what he has a right to have and to offer in evidence in cross-examination of this witness.

I want to point out to Your Honor what he has asked for is very different from what Your Honor has just stated. There has been examination on voir dire, and otherwise, to the effect that certain profits or losses had relation to the T.V.A. letting. I think there is some evidence as to $1.50 as being a fair figure for the T.V.A. cost.

Mr. Wooden: Well, the $1.50 was estimate—

Mr. Leisure: May I just finish?

Trial Examiner Norwood: Let him finish.

Mr. Wooden: Then state things correctly.

Trial Examiner Norwood: Go ahead.

Mr. Leisure: As I said before, it is my recollection that there was some testimony to the effect that $1.50 was a fair figure with respect to that cost.

Now, to want to cross-examine about that is one thing, but to ask for profit and loss statements covering the entire production of this mill is quite another, and it has been my understanding up to this moment that Your Honor has ruled those things out, and if they go in with respect to this mill, all of its profits and losses, generally, in my opin-

tion, that opens the door for us to call each company, as they come along, and prove similar things with re-
32919 gard to profits and losses.

Now, because of that fact we have been unable to find in the record anything which would entitle Mr. Wooden to ask for the profit and loss statements.

Have I made myself clear on that point?

Trial Examiner Norwood: I understand Counsel's contention.

Mr. Wooden: All I wish to know at this time is whether Mr. Smith, who says he brought those profit and loss statements and balance sheets here, whether he is going to permit us to have them as a basis for cross-examination of this witness.

Mr. Leisure: To just turn over the general profit and loss statements of this company for Government's Counsel to fish—

Trial Examiner Norwood: I think that the profit and loss statements for those years would bear directly on the figures which this witness has given us here; in other words, he has given us a part of the story, an estimate he made from a study of these papers.

Mr. Werle: Oh, no.

Mr. Leisure: No.

Mr. Smith: No.

Trial Examiner Norwood: Now, the papers, also should be made available to the other side for cross-
32920 examination; and if they are not made available, I am going to strike his testimony.

Mr. Werle: Your Honor, may I make a statement?

Trial Examiner Norwood: If there is a motion to that effect?

Mr. Werle: May I be heard a moment on that, Your Honor?

Trial Examiner Norwood: Yes.

Mr. Werle: I think that perhaps we are getting a little too confused with what has happened previously when Major Lewis was testifying.

There was a lot of demand at that time by Mr. MacIntyre for something he referred to as basic data. He said there are underlying papers, and things of that character.

Trial Examiner Norwood: Yes.

Mr. Werle: As to a lot of exhibits. That objection was directed at a number of exhibits that went in. I think there were three particularly. Now, whether or not there is basic

data is one question, papers to which this witness may have referred when he made up that cost estimate we are talking about; but profit and loss statements, he never looked at them, he has already told us that, that they are not in his custody, he hasn't anything to do with them, and earnings haven't any bearing on the question of what he
32921 figured out would be an estimated cost for his plant in 1934, and they want earnings and profits and losses from 1933 to date.

Mr. MacIntyre: Your Honor please—

Trial Examiner Norwood: The profit and loss balances of his company contain the data which would enable the other side to test the testimony of this witness.

Mr. MacIntyre: Yes, and if Your Honor please, it not only permits a test of it on one or two items, but it permits a test of the entire burden of the testimony of this witness.

I just want to call your attention to the portion of the record where this witness identified, and you received over our objection, certain documents that he had prepared.

Mr. Werle: What documents?

Mr. MacIntyre: Received for that cost estimate, not only of the Volunteer Company, but of the proposed T.V.A. mill, and even of other mills in the Tennessee Valley group—yes, Tennessee Valley group—and we objected that they had to be based upon some knowledge that this witness had gained from certain records or experience of his company. In fact, after they were received,—or in part before they were received,—Mr. Werle approached the wit-
32922 ness and had him to state that these specific costs of the Volunteer on a number of those items were higher than those shown, for example, on Exhibit 2194-A and B—that is, Respondent's exhibit.

Trial Examiner Norwood: Yes.

Mr. MacIntyre: Our hands were tied. We had no way of testing this witness' knowledge as to the statements he was thus making. He went on and received an exhibit—received in evidence Exhibit 2201, which is a booklet in itself, of practically a hundred pages, all of cost estimates.

We attempted to get at this basis for it on voir dire to show you it was not admissible, except in so far as this witness had attempted to base his statements contained therein upon his experience which he had in turn gained from the operations and the records of the Volunteer Company; but over our objections that was received.

Now, our hands are tied unless we are able to go back of these statements and inquire into the record of the company to see what that experience of that company was, which, of course, is this witness' experience. And we have not seen fit to take the time to go down to Knoxville and spend three months going over all of the detail first entry records of the record, but we have merely attempted to make a short cut, taking the overall experience of
32923 the witness' company, through its results which we felt in themselves repudiated, to a great degree, the witness' testimony on direct, and I think that the observations that you have made on the point, as to whether or not that they are produced, or whether or not our hands are left tied, through a lack of their production, should serve as a basis for the consideration of striking all of the testimony of this witness that relates to such subjects as profits, losses, costs, estimates of costs, and fairness of prices based on such factors.

Mr. Wooden: I can't understand, Your Honor, why, if Counsel for Respondents wanted to go into this subject, why they want to go into it so far and no further. That is what is involved in this apparent discussion of theirs. Every company has balance sheets and profit and loss statements. It is not anything particularly secret. Most companies publish it to the world.

Mr. Leisure: Have you finished, both of you, Mr. MacIntyre and Mr. Wooden?

Mr. Wooden: For the time being, yes.

Mr. Leisure: If Your Honor pleases, there has been restated at least three times by Commission's Counsel precisely what I said a moment ago, that there was testimony having to do with the costs of T.V.A., but there is not the slightest thing having to do with the general costs
32924 of this company.

Now, if we could confine our discussion to the point involved; namely, whether or not they are figures showing the costs of T.V.A., I think we might get somewhere.

Trial Examiner Norwood: This witness, though, gave testimony as to the costs, or as to what he can sell cement for at a fair profit, and costs were involved.

Mr. Leisure: At T.V.A.

Trial Examiner Norwood: No; as to what he considered cost.

Mr. Leisure: At T.V.A.

Mr. Werle: To T.V.A., Your Honor.

And in that connection, before we get too far away from Mr. MacIntyre's statement, I think we ought to be fair here. Now, that statement, to my mind, means nothing. He has gone into a long harrangue, Judge, about all these documents and papers, and so on. I want to know what papers he is talking about, and if there is any data which Major Lewis referred to when he made any of these papers that we are talking about, Commission's Counsel can have them.

Trial Examiner Norwood: Well, if he has not referred to that data, it should not have been admitted at the time, and I would entertain a motion to strike on that ground.

32925 Mr. Werle: I am prepared right at this moment to turn over to Government Counsel papers which were handed to me by Major Lewis when he returned here as the papers which he used in making up three of the Commission's exhibits,—and I think there are only three that are involved in this long harang here.

Trial Examiner Norwood: Yes, but suppose he just used a small part. The other part is in the possession of your company.

Mr. Werle: But there is no need for the whole story, Judge. This man did not give any testimony about his profits, or his earnings. Here is what he said: He said, "T. V. A. said to us, 'You ought to be able to sell us cement for so much.' I went back home and I sat down and I worked out what I thought it would cost me. I used —it was an estimated cost." He said that.

Trial Examiner Norwood: Yes.

Mr. Werle: He said, "I used some prior records of the company to check that." And he said, "I drew up this estimate of cost. This is the basis on which the president and myself sat down with these people. That was my estimate."

Now, as to any records he referred to in making the estimate, I have them here, and they can have them if they need them to cross-examine.

32926 Mr. Wooden: That is all right, Your Honor. They are more ready today to do that than before.

But the point is this: The witness turned in estimates, Exhibits 2194 A and B, and 2195, showing estimated costs of a dollar and a half a barrel, claiming that that was cost. We propose to show, if allowed, that not only was

that estimated cost inflated and excessive, but that a smaller price from T. V. A. was indeed proper, and that the price obtained from T. V. A. on the average was higher than the price obtained in its other business. And we need those documents to demonstrate those facts.

Mr. Werle: But whether that is so or whether it is not so, it hasn't anything to do with the direct examination of this witness. Now, if Mr. Wooden wants to—

Trial Examiner Norwood: You mean they would have a right to subpoena those papers and put them in?

Mr. Werle: I did not say that.

Mr. Leisure: Simply to cross-examine.

Trial Examiner Norwood: I say put them in, as their reply testimony.

Mr. MacIntyre: If Your Honor please, on that point we need them now to have this witness to explain and to reconcile through his explanations the testimony he gave on direct.

Trial Examiner Norwood: Well, without any
32927 further discussion on either side, I will state that if those papers are not turned over to the Counsel for cross-examination, I am going to strike this witness' testimony with respect to those costs.

Mr. Leisure: Let us have clear what the Examiner's ruling is about those papers, because that is important.

Trial Examiner Norwood: Any documents that he has there that bear on those costs and has any information with respect to this witness' testimony.

Mr. MacIntyre: The papers I am referring to are the profit and loss statements.

Trial Examiner Norwood: He can't pick out a few statements from the file of his company and give it here when there are other papers in the same file which might show the whole complete and correct story.

Mr. Leisure: And is the converse of that equally true, that if the testimony bears upon T. V. A., and only upon T. V. A., that we are compelled to turn over papers having nothing to do with T. V. A.?

Trial Examiner Norwood: I did not say that.

Mr. Leisure: Or the testimony to be stricken?

Mr. MacIntyre: They do relate to T. V. A., because they include the T. V. A. results. We want the whole story.

Mr. Smith: How many years?

32928 Mr. MacIntyre: We ask for 1933 to 1938.

Mr. Werle: As I understand the ruling, if the

profits and loss statements for the years 1933 to 1938 are not turned over for cross-examination, all the testimony of this witness as to T. V. A. is to be stricken?

Trial Examiner Norwood: All the testimony as to those costs. We will study the record to see just what is to be struck.

Mr. MacIntyre: We would contend in that connection, if Your Honor please, that all the testimony in the form of exhibits or oral testimony by this witness concerning the fairness of price, or that goes to the fairness of price, should also be stricken; because the earnings of this company, including at least a part of the shipments on T. V. A., would show at least what its fairness of the prices charged T. V. A. were, and how unfair, if unfair, they are.

Mr. Leisure: So that the record may be clear, do I understand that if we turn over these profit and loss statements from 1933 to the beginning of—that is, the end of 1937, that we can produce them to Your Honor, who will pass upon the materiality and relevancy before turning them over to the Counsel, so that we may offer them in toto in evidence if Counsel for the Commission does not?

32929 Trial Examiner Norwood: No, I do not think that is a necessary condition.

Mr. Leisure: Then, we decline.

Trial Examiner Norwood: You may have them marked for identification.

Mr. Leisure: Then we refuse to turn them over to Counsel under any other consideration.

Trial Examiner Norwood: The purpose of introducing these in evidence, you may introduce them—either side may offer them in evidence later, but this is for the purpose of enabling cross-examination of this witness on the figures that he has given in here.

Mr. Leisure: Well, unless we can be sure that they are going in evidence, we decline to produce them for that purpose.

Trial Examiner Norwood: Yes.

Well, that is that.

Now, off the record.

(There was a discussion off the record.)

Trial Examiner Norwood: For the record.

Mr. Wooden: Your Honor, there were two classes of evidence offered and received through the Witness Lewis regarding costs:

First, evidence relating to estimated costs of the proposed T. V. A. plant.

32930 Second, evidence relating to the estimated costs of the Volunteer Company.

The first class of evidence is offered to disprove the accuracy of the T. V. A. estimated costs for a Government mill. The accuracy of those estimates is not in issue. They were not offered to establish the costs of a Government mill. They were simply a factor on which Respondents acted in deciding their price policy on sales to T. V. A.

Mr. Lewis, himself, has testified, page 31640, that the October, 1934, price to T. V. A. was a price that would be "competitive with the proposed T. V. A. cement plant to be built at Muscle Shoals."

Respondents have frequently offered evidence that was admittedly incompetent to establish the truth of the statements involved, and it was received solely because Respondents acted upon it. I ask that the same treatment be accorded the evidence regarding estimated costs of the proposed T. V. A. mill, and that Respondents be precluded from making an issue of the accuracy of those costs, just as I assume that we would be precluded from making an issue of the numerous factual statments which Respondents have put into the record, and which were received solely as the basis on which Respondents acted.

To make the record more formal on this question,

32931 I hereby state and agree that the evidence offered by Counsel for the Commission relating to estimated costs of the proposed T. V. A. mill shall not be taking as establishing the accuracy of those estimates. I, therefore, move that the following testimony and exhibits offered by Respondents relating to and contesting those estimated costs be stricken as irrelevant and immaterial to any issue raised by evidence offered by Commission's Counsel.

Now, the exhibits and testimony that come within that part of the motion are as follows:

Respondents' Exhibits 2196-A and B, 2197-A, B, and C, 2201-A to Z-71, inclusive, 2202-A to G, inclusive, 2203, 2204-A and B.

The portions of Mr. Lewis' testimony regarding T. V. A. mill costs which are included in the motion to strike are as follows:

Page 31538, line 17, to page 31571, line 20, some 33 pages.
Page 31587, line 5, to page 31639, line 14, some 52 pages.

Page 31640, line 22, to page 31649, inclusive, some 9 pages.

Page 31657, line 15, to page 31664, line 12, some 7 pages.

Page 31668, line 25, to page 31669, line 11, one page.

Page 31676, line 5, to page 31676, line 25, one page.

A total of approximately 103 pages of transcript.

Now, let us consider the second class of evidence here involved, that relating to the estimated costs of the Volunteer Company.

One possible theory on which such costs were offered and received is that it meets evidence offered by the Commission relating to the average costs of 15 companies interested in T. V. A. business as included in a Price-Waterhouse survey made for the whole industry on a previous occasion. The accuracy of the Price-Waterhouse average costs is not in issue. They were not offered to establish the costs of any company and would not do so because no company's costs are separately shown in them. They were not offered to establish even the average costs of the 15 companies. In fact, their accuracy may well be doubted in the absence of evidence as to the methods employed. But here again these Price-Waterhouse average cost figures were simply a factor on which Respondents acted in their united negotiations with T. V. A. for the purpose of arriving at a price.

Another reason the evidence regarding estimated costs of the Volunteer Company is irrelevant and imma-
32933 terial is that it obviously does not meet or tend to contradict the Price-Waterhouse average costs. The fact that one is an average cost and the other is an estimated cost for a company included in the average demonstrates that the latter cannot be taken as meeting the former. The estimated company cost could go only to meet the company cost contained in the Price-Waterhouse survey, but this latter cost is not known and is not in evidence.

To clear the record on this point, I hereby state and agree that the evidence offered by Counsel for the Commission relating to average costs shown by the Price-Waterhouse survey shall not be taken to establish the accuracy of those costs. Therefore, I move that the evidence offered through the Witness Lewis relating to estimated costs of the Volunteer Company be stricken as ir-

relevant and immaterial to any issue raised by evidence offered by Commission's Counsel.

The evidence covered by this part of the motion is as follows:

Respondents' Exhibits 2194-A and B, and 2195.

The following testimony of the Witness Lewis:

Page 31478, line 3, to page 31504, line 14, some 26 pages.

Page 31433, line 22, to page 31456, line 8, some 17 pages.

32934 Page 31515, line 20, to page 31538, line 15, some 23 pages.

Page 31677, line 10, to page 31681, line 22, some 3 pages.

Page 31693, line 6, to page 31698, line 9, some 5 pages.

A total of some 74 pages relating to the subject of Volunteer Company's estimated costs.

Another ground on which the estimated costs of Volunteer Company seem to have been offered and received is that it goes to meet evidence offered by Commission's Counsel concerning a conversation in which a Volunteer Company official was testified to have said it could make good money on T. V. A. business at $1.25 per barrel but was afraid of reprisals by competitors if it did so.

I have offered on January 26th, page 31512 of the record, to restrict that evidence to the occurrence of the conversation and to agree that it was not to be taken as evidence of the relation of price to cost, or whether the $1.25 price was a profitable one for Volunteer. That offer is now repeated. So there is no issue of fact on that score for Respondents to meet. Therefore, the motion already made to strike the evidence offered through the Witness Lewis should not be disallowed because of the evidence 32935 about the conversation referred to.

Trial Examiner Norwood: What do you have to say to that, Mr. Werle—Mr. Leisure?

Mr. Leisure: We feel that the evidence which we have introduced here is proper in meeting the T. V. A. situation as it exists in the record, and as it still exists in the record, and I think that it should remain in the record.

Trial Examiner Norwood: Don't you think that Mr. Wooden's motion and statement straightened out this whole matter and eliminates costs hereafter?—

Mr. Werle: Oh, I do not think it does.

Trial Examiner Norwood: —from this case?

Mr. Werle: I do not think it does a thing, Judge.

listened to it pretty carefully, it was pretty involved, but I happen to have been through this T. V. A. evidence quite recently, and pretty thoroughly—by that I mean the Government's evidence—

Trial Examiner Norwood: Yes.

Mr. Werle: —and if that statement is intended to do anything about the T. V. A. evidence that the Government has put in there, well it fails miserably, because the little concessions, or purported concessions, that Mr. Wooden is making here, I do not think they do a thing. They have document after document in there about prices and
32936 costs and unfair systems, and profits and earnings, they have all that stuff in their case on this thing, and we have not attempted to go that far on it in meeting their case. We have tried to meet particular evidence that they have put in through the testimony of Major Lewis, and I could go down the line and tell you what we have tried to meet on it. We haven't tried to go beyond it at all, but I don't think these concessions amount to a thing.

Trial Examiner Norwood: Now, there is some testimony—there were questions asked the witness with regard to that low 90-cent mill net in Cleveland, as to whether they could make money at it or not, and there is testimony in the record from which inferences could be drawn that are contrary to the interests of these Respondents as to the fairness of the price.

Mr. Werle: There is no testimony of this witness like that.

Trial Examiner Norwood: If you are going to eliminate that, let us eliminate all, and if we are not, let us go into the whole matter.

Now, one or the other? Either costs and fairness of price are in, or they are out. If they are in, why, we are going to leave all of this in, except the matter here that is put in piecemeal, where you haven't got the complete
32937 story I should strike that as merely a question of fairness.

Mr. Wooden: I again say, Your Honor, that I do not believe you would permit us to contest the truth of any exhibits that they have offered simply showing a basis on which they acted. That is, it simply raises a collateral issue into which we would not be permitted to go.

Trial Examiner Norwood: In other words, you are proposing to eliminate all testimony in evidence going to whether or not the prices are fair prices?

Mr. Wegle: He hasn't said that, or anything like that.

Trial Examiner Norwood: And it includes also cost data.

Mr. Leisure: I think his statement is very clear as to what he intended, and I do not believe we can enlarge on it in any way.

Trial Examiner Norwood: Wait a moment—let us get this.

Are you willing to do that?

Mr. Wooden: My statement did not go that far, and was not intended to go that far. That is a further question I might consider—

Trial Examiner Norwood: Yes.

Mr. Wooden: —after the present question has
32938 been passed upon and we know where we stand on it.

Mr. MacIntyre: But, Your Honor please, we went to all of this T. V. A. cost data.

Trial Examiner Norwood: Yes.

Mr. MacIntyre: The statement has more than covered that,—in stipulating that it be conditioned so as to not be permitted to show costs, losses, profits, or fairness of price,—so if it is so conditioned, what they are doing by offering anything through this witness, that would relate to any of those things, would be simply setting up a straw man and knocking him down, because you would not permit us to offer—

Trial Examiner Norwood (Interposing): Listen: Fairness of price is either in this case or out of this case, and if fairness of price is in this case anywhere then the figures as to any particular company showing that certain figures are fair will be relevant and material, and may be put in, if they will complete a story, and put it in correctly. It is either in or it is out. I want to know which.

Mr. Wooden: I have always taken the position, Your Honor, that the fairness of the price, and the costs of the company, in relation to price, are irrelevant and immaterial to the issues of the case, because they do not tend
one way or another, to establish the existence or
32939 non-existence of an alleged combination.

I also say that if the existence of the combination is established by other evidence, then I would propose to say that that in itself carries with it the implication—the necessary implication—of unreasonableness of price.

Mr. Leisure: Of course our position is, Your Honor, and has been since this case started, that fairness of price,

and costs, are in this case, and that it has a direct bearing as to whether or not there is in existence a conspiracy or combination.

Mr. MacIntyre: They could not possibly allege the latter without admitting the first.

Trial Examiner Norwood: Now, then—

Mr. MacIntyre: That is, that the prices are reasonable, although we do have combination, such as was the case in the Appalachian Coal case, and he has to meet the first—

Trial Examiner Norwood (Interposing): I will state, gentlemen, now, that this is an administrative hearing. We have gone to the trohule of taking in this information here, and as long as it is here I should be reluctant to strike it provided the Respondents' Counsel is fair and furnishes this information as to these figures here. If they do not, I am going to strike the testimony of this witness because he has put in something piecemeal 32940 here, which your company should show fully.

Mr. Werle: Your Honor please—

Mr. Leisure: If Your Honor pleases—

Trial Examiner Norwood: Now, as to the other part, I should be disinclined to strike it, but I am reserving the ruling on that motion until I can study the record on it. I could not pass on that now without seeing the record; I will have to give it some study.

Mr. Wooden: How are we to cross-examine the witness without knowing what Your Honor's ruling is going to be on it? In other words, if Your ruling is to strike, why, there wouldn't need to be any cross-examination on it.

Trial Examiner Norwood: Yes, I see.

Mr. Wooden: But it is a fact that the refusal to provide these records is sufficient in and of itself to strike this particular type and class of evidence.

Trial Examiner Norwood: In my opinion that is sufficent to strike all of the evidence relating to the costs and prices of his own company.

Mr. Wooden: Yes, that is what I mean.

Trial Examiner Norwood: Yes.

Mr. Leisure: Well, now, theer is so much general language—

Trial Examiner Norwood: Then I shall strike that

unless you give the Commission's Counsel the data
32941. on which that testimony was based, or the date which contains the complete facts with regard to it.

Mr. Werle: We have already offered that.

Mr. Leisure: There has been so much general language here, if Your Honor pleases, that I think the record is getting into a great state of confusion.

Mr. Wooden uses the phraseology of these records on which this data was based—

Mr. Wooden: (Interposing.) No.

Mr. Leisure: —and then the Examiner uses it in his ruling—

Mr. Wooden: (Interposing.) No.

Mr. Leisure: —whereas Mr. Wooden's statement was very clear. We have said at least three times this morning that these general profit and loss statements have nothing whatever to do with this witness' testimony, and he never looked at them.

Trial Examiner Norwood: I am talking about this witness' testimony as to what particular papers he used. I am talking about the profit and loss statements that contained all the facts with regard to this. He may have picked out one or two. He may have been given three or four papers that contained one side of the question, and made his estimate on that in good faith.

Mr. Werle: Well, now—

32942 Trial Examiner Norwood: And all that. I don't know anything about that, but I know that if you do not give the complete figure, I am going to strike, as I stated.

Mr. Werle: Your Honor, that is the purpose of cross-examination. If they want to ask this witness, "What did you base it on?" "Do you have it here?" "May I see it?" All right. But they have not asked him one single question.

We have had three statements by Your Honor here that we have put in piecemeal presentation of these figures. Well, that is not so. We have put in everything.

Trial Examiner Norwood: I mean for all that appears to me at this time. Now, it may be that those papers will show that that is the entire story, and that it is absolutely correct; but this is an administrative procedure and we are trying to get the facts, and the whole facts of it. There is no place here for any tactics that would get in part of it and leave out the other.

Mr. MacIntyre: Your Honor please—

Trial Examiner Norwood: Yes.

Mr. MacIntyre: —on that last point raised by Mr. Werle, let me read you one statement from the record,—it is lines 8 to 15, pages 31500. Question by Mr. Werle: "Q. Now, can you tell us when those increased costs began to affect the Volunteer Portland Cement
32943 Company? "A. They started in July, 1933, at which time we reduced working hours for our employees to 42 hours a week, at the same time maintaining their previous wage scale."

Now, when did that begin to affect the Volunteer? 1933, so the answer goes. The profit and loss statements, and the balance sheets show to what degree, if any, they affected the company.

Trial Examiner Norwood: Well, yes, we will face—

Mr. MacIntyre: It is the over-all picture, the inpoint, so to speak, results of this company's operations, and we want to show just how much weight is to be given that particular statement of the witness. It is an example,—an illustration, if you please,—of the entire burden of his testimony.

Mr. Leisure: Those papers on which the witness based that testimony I hold in my hand.

Mr. MacIntyre: Which, in turn, are based on other records of the company.

(There was an exchange of remarks off the record.)

Mr. Leisure: We hold those papers in our hands. They have nothing to do with the profit and loss statement, however.

Trial Examiner Norwood: Yes.

Mr. Leisure: It is a question of whether or not he wants what he pretends he asks for, or something
32944 else. He can have the other, I am sure, if it is going into the evidence.

Trial Examiner Norwood: We have gone around in a circle, and my statement is just the same, he can produce them or else I will strike it.

Go ahead.

Mr. Leisure: When you say "produce them," as I understand you—

Trial Examiner Norwood: The profit and loss statements.

Mr. Leisure: The profit and loss statements on the whole company?

Trial Examiner Norwood: If he produces them, why—

Mr. Smith: Well, if Your Honor please, I do not know what Your Honor means by producing them, as we have inquired before. It seems to me that if we produce them, they could be produced to Your Honor, and should be marked for identification.

Trial Examiner Norwood: They may be marked.

Mr. Smith: And Your Honor should rule as to whether or not they are admissible; but if it means to hand them over to Government Counsel and let him fish through them and see whether or not he likes them, why, that is something else.

Trial Examiner Norwood: He is to use those
32945 just the same as the Counsel used documents turned over to them by the Government to cross-examine witnesses. They may be marked for identification—

Mr. Leisure: We have covered our position.

Trial Examiner Norwood: —if you wish to do so.

I see no necessity for passing upon whether or not they are admissible in evidence at this time; but you may have them marked for identification, and you may turn them over to Counsel for the Commission, and I think you might decide that now without any further—

Mr. Leisure: We have already passed on that—

Trial Examiner Norwood: You state your refusal so to do?

Mr. Leisure: —on the procedure suggested.

Trial Examiner Norwood: All right.

Mr. Leisure: We decline to do it.

Trial Examiner Norwood: Now, you can cross-examine on anything else, and I shall strike all the testimony bearing on the question of prices, after I can see the line and page as to what to strike.

Mr. MacIntyre: Do we understand that would also include the so-called estimates that he made up of costs that would be incurred by T. V. A. which the witness on voir dire said was based upon his experience and information that he had as to the operations in the cement
32946 industry, which, of course, has been shown to be that of the Volunteer Company?

Mr. Werle: He did not say anything of the kind.

Trial Examiner Norwood: I am not passing on anything with regard to the T. V. A. figures.

Mr. MacIntyre: Well, it is all tied together in his testimony.

Trial Examiner Norwood: As I say, I am not passing on anything with regard to the T. V. A. figures.

Mr. MacIntyre: It is tied together in his testimony; they have, for example, taken Respondents' Exhibits 2194-A and B and Respondents' Exhibit 2201, and put it into evidence as showing figures of costs which they say that this witness gave based on his experience and knowledge of operations in the cement industry.

Well, according to his testimony, that knowledge and experience of operations in the cement industry in the Tennessee Valley District is the experience of the operations of the Volunteer Portland Cement Company. There isn't any other way to test him on that.

Trial Examiner Norwood: Wait a moment.

Mr. MacIntyre: Other than to show what those were.

Trial Examiner Norwood: I have just made my statement with respect to these costs of his own company.

Now, as to their leave to cross-examine him on it,
32947 it is not just clear what you want with regard to those figures.

Go ahead.

Mr. Wooden: Your Honor, would it be in order to give us just a few moments to consult this turn of events that is called for?

Trial Examiner Norwood: Yes, take five minutes' recess.

(There was a short recess taken.)

Trial Examiner Norwood: Proceed with the cross-examination and examine him on other subjects while I take the motion of Mr. Wooden into consideration. We will refer to the record during the noon hour to see what I can find out about it.

Mr. Wooden: Your Honor, it is going to be extremely difficult, if not impossible, to make cross-examination of the witness without knowing what the ruling is to be with regard to the one class of exhibits and testimony relating to T. V. A. estimated costs.

As to the other, I think we can make an attempt to do the best we can.

Trial Examiner Norwood: Well, I think that I shall allow the motion to strike his oral testimony with regard to the costs of his own company there, as we discussed, on the grounds that this other data is in the posses-
32948 sion of Respondents and they have not furnished it to you for cross-examination.

Mr. Leisure: The other data being the—

Trial Examiner Norwood: Yes. We understand that. The profit and loss statements.

Mr. Leisure: —the profit and loss statements.

Trial Examiner Norwood: I am also taking into consideration the matter of eliminating all costs from this proceeding.

Mr. Wooden: May I proceed?

Trial Examiner Norwood: Go ahead.

By Mr. Wooden:

Q. Major Lewis, have you produced from your records the number of barrels of Portland cement shipped by the Volunteer Company each year upon order of the T. V. A. and the total net in terms of dollars and cents received each year for such shipments?

Mr. Werle: Judge, the witness, in the first place, was not asked to produce them; and, in the second place, we are now getting into the number of barrels shipped to T. V. A., and I suppose we are going to get into costs and nets again.

I object to the question.

Mr. Wooden: That is not a matter of costs.

Trial Examiner Norwood: He has a right to find 32949 out the basis of his statements, to disclose his experience, his knowledge on the subject about which he testified to.

Objection overruled.

Mr. Werle: The question is whether he produced something. He is not asked something about facts.

Trial Examiner Norwood: Well, he may tell him whether or not he produced it, certainly.

Go ahead.

The Witness: Read the question, please.

(Last question read by Reporter.)

A. I had such a statement prepared, Mr. Wooden.

By Mr. Wooden:

Q. You have it here?

A. It is here in the courtroom, yes.

Q. May I see it, please?

A. It is in the hands of Counsel.

Mr. Werle: Judge, as Your Honor has ruled, as I understand it, you are striking out all of this witness' testimony as to costs, fair price, in connection with T. V. A.

Now, if that is so there isn't any occasion for going into this subject at all.

Trial Examiner Norwood: Well, if you will furnish them the supporting data here, furnish them the facts within your possession there, they will—

Mr. Werle: This is not supporting data, Your
32950 Honor; this is something that Mr. Wooden has asked this witness in this letter which is marked for identification.

Trial Examiner Norwood: Well, I have not ruled yet. I simply told you what I can do in case this witness does not tell us the whole story. Maybe he can satisfy the Counsel on the other side as to all of these facts. He may possibly find he does not need those papers. I don't know.

Mr. MacIntyre: If Your Honor please, we have got the request that is now in issue confused with some other. This does not involve profits, losses, or costs. It involves a matter of statement of fact as to the total shipments made to T. V. A. by this witness' company by years and the total amounts received by this company from T. V. A. for such shipments. That does not go as to profits, costs, or losses. It is a matter of what they received for the cement they sold to that particular customer. And Mr. Werle on direct examination had the witness to go into considerable detail as to how much cement that they had shipped on each of a number of projects.

Trial Examiner Norwood: Yes.

Mr. MacIntyre: It seems to me it is merely a follow-up of what was asked on direct.

Mr. Werle: We have no objection to telling and pro-
ducing in evidence showing the number of ship-
32951 ments that they made to T. V. A., but when we get into the question of return of this company, we are going into the question of prices and fair prices again.

Now, as I understood Your Honor's ruling, it was that all of this testimony of the witness as to cost and fair price is stricken because we did not produce balance sheets and profit and loss statements.

Now, if that is the ruling, thre is no occasion for going into the subject matter.

Trial Examiner Norwood: Now, I said I was going to do that unless this other information can be obtained. You can give the Counsel for the Commission these profit and loss sheets, or it may be that this witness can give

the figures without them. I don't know. Let us see what is going to happen. But unless the whole story is told here, I am going to strike the piecemeal story.

Now, the objection is overruled and the witness can answer the question.

Mr. Wooden: Is there a question?

(The record was read by the Reporter.)

Mr. Wooden: I would just like to inquire of Counsel for the Respondents, including Counsel for the Volunteer Company, whether he will produce at this time for our use in cross-examination the statement which the witness says he prepared and turned over to them, showing
32952 the number of barrels shipped to T. V. A. each year, and the net amounts received for those shipments.

Mr. Smith: We will turn that over, but your statement is not quite correct, that the witness said he prepared it. He did not prepare it; he had it prepared by a man from records from which it could be prepared.

Mr. Werle: While we think the subject matter is now beyond the direct, I am turning over to Mr. Wooden the statement (handing a paper to Mr. Wooden).

Trial Examiner Norwood: Go ahead.

(Mr. Wooden examines a paper.)

Mr. Wooden: May we have this marked for identification?

Trial Examiner Norwood: Yes.

(The document was marked for identification "Commission's Exhibit 3243.")

Trial Examiner Norwood: Go ahead.

By Mr. Wooden:

Q. Major Lewis, will you tell us what the paper is that is marked Commission's Exhibit 3243, for identification?

A. That is a tabulation for the years 1933, '34, '35, '36, and '37, showing our total shipments to all customers, our shipments to T. V. A., and shipments to other customers, separated for each of those years.

Mr. Werle: Excuse me (looking over the wit-
32953 ness' shoulder).

The Witness: No. Wait a minute.

Mr. Wooden: I don't know that there are other customers.

The Witness: This is all T. V. A. Excuse me, Mr. Wooden.

This shows the shipments by years and quantities and by amounts billed and net charges for cement shipped to T. V. A. during those years.

By Mr. Wooden:

Q. That shows the net, exclusive of all freight allowances?

A. Yes. It shows deductions made, tabulated toward the bottom of the sheet, and the net to the lowest line of figures is the total net charge for each of those years.

Q. Do you vouch for the truth and accuracy of the figures shown on the paper?

A. They were not made by me. They were drawn from my records, but they were made by our secretary and treasurer, who I think is usually quite accurate in his work. I think within human limits it is accurate; yes, sir.

Mr. Wooden: I would like to offer that document in evidence, if Your Honor please.

Mr. Werle: Of course, we object to it on the same ground that we objected to this inquiry at this time,—on the state of the record.

32954 Mr. MacIntyre: If Your Honor pleases, during direct examination of this witness, Respondents' Exhibit 2199 was offered showing a total barrelage of cement shipped by this company.

Trial Examiner Norwood: Yes.

Mr. MacIntyre: For each of the years it has been in operation, into various districts. There was also testimony, and other documents, offered, through which there was an effort made to show that the business done by this company with the United States Government, or any agencies thereof, was inconsequential with respect to the total.

Now, the offer pending, when taken in the light of the Respondents' Exhibit 2199, and the other testimony of the witness, shows how substantial a part of the total business, the T.V.A. business, was to the Volunteer Portland Cement Company. It goes to that point.

(COM. EX. 3243 was offered and received in evidence.)

By Mr. Wooden:

Q. Major Lewis, I am calling your attention to
32955 your testimony on page 31640, beginning with line 6 and running through line 13 (showing official record to the witness).

A. Yes.

Q. The substance of that is; is it not, that your October, 1934, prices to T.V.A. were based on what would be competitive with the proposed T.V.A. cement plant?

A. No, sir. We had a contract with T.V.A. dated March 15, 1934, under which we were shipping them at a price we bid of $1.75 f.o.b. our mill subject to 10 cents discount.

Now, this is a discussion, Mr. Wooden, of a large contract which had not yet been negotiated.

Q. Yes, of course, it was before the October contract.

A. Yes.

Q. But the substance of your testimony is there that in September of 1934 you were figuring on a price based on competition that would be competitive with the proposed T.V.A. plant?

A. That was in connection with this proposed contract which had not yet been made.

Q. That is right; I understand.

Now, will you look at page 31669, beginning at the bottom of page 31668 (referring to official record).

(Witness examines record.)

Q. The question was asked you whether, from your study of the proposed Tennessee Valley authority plant costs which you made, were the prices bid on this invitation based on what T.V.A. could have made and furnished
32956 the cement for to its own dams,—and your answer to that—after the question was repeated,—was "No."

A. Yes.

Q. Will you tell me which one of those answers is right? As I understand it, in one case you said it was based on the estimated costs of the T.V.A. plant, and the other place you said it was not. Can you—

Mr. Werle: Your Honor, that inquiry, again, is going into prices and costs, and I object to it on that ground.

Trial Examiner Norwood: Well—

Mr. Wooden: Just a matter of attempting to clear up an inconsistent statement of the witness,—what appears to me to be inconsistent.

Trial Examiner Norwood: Yes.

The Witness: Are you waiting for my answer, Mr. Wooden?

Mr. Wooden: Oh, yes.

The Witness: Excuse me.

Mr. Werle: What pages were those?

Mr. Wooden: 31669—31668.

A. There is no conflict, as I see it. At the time being discussed in these questions it was—we had received a telegram from Dr. Morgan which, by inference, stated
32957 he had given up the competitive idea and was establishing a price beyond which he would not go, regardless of any cost, or anything else.

By Mr. Wooden:

Q. All right. You do not think there is any inconsistency there?

A. No, I do not think so.

Q. All right.

Trial Examiner Norwood: Now, we are still going into something that we might eliminate in case we do something definite about these costs. I wanted to ask the Counsel for the Commission if he was willing to include in his motion those engineer's reports and the cost data, that was put in by the Government with respect to this T.V.A. matter, or if he is willing to include those I think I shall allow his motion in toto.

Mr. Wooden: My motion is not that, Your Honor.

I contend that the exhibits and testimony of this witness, to which my motion relates, should be struck for the reason stated, because of the limitations I was willing to place upon that other evidence.

Trial Examiner Norwood: Yes.

Mr. Wooden: In addition to that, we have shown this morning an additional reason which is in itself sufficient for striking; in other words, the failure or refusal to
32958 turn over the profit and loss statements.

Trial Examiner Norwood: Well, I have already stated that I agree with Counsel on that, but I was simply referring to—

Mr. Wooden: It seems to me that that is something that we can—

Trial Examiner Norwood: —settling the entire matter.

Mr. Wooden: It is something that we can face independently of the immediate question involved in this witness' position.

Trial Examiner Norwood: Well, go ahead.

(There was a long pause.)

Mr. Wooden: Well, Your Honor, with regard to the question you put a moment ago—

Trial Examiner Norwood: Yes?

Mr. Wooden: —I am ready to state at this time that we will consent to a deletion of any portions of any documents that relate to costs either of the industry or any portions of the industry, or of estimated costs with the T.V.A. proposed plant.

Trial Examiner Norwood: Yes. Well—

Mr. Wooden: Now, I do not mean by that every document that contains incidentally some reference to those costs shall be deleted.

32959 Trial Examiner Norwood: I understand.

Mr. Wooden: But the portions of them that relate to those subjects.

Trial Examiner Norwood: All of that, and any evidence on estimated costs of producing cement under the T.V.A., I understand that your motion includes the striking of these?

Mr. Wooden: All profits and losses.

Trial Examiner Norwood: Yes.

Mr. Wooden: On T.V.A., or fairness of price to T.V.A.

Trial Examiner Norwood: Well, I shall allow that motion, and will you please designate those of the Commission's exhibits which are to be included in that?

You may do that later for the record.

Mr. Werle: Judge, when such a list is made up, I assume that we will have an opportunity to look at it, and make whatever statement or objection, or whatever might be necessary at the time.

Trial Examiner Norwood: Yes.

Mr. Werle: In other words, we are not consenting to this blanket statement of Counsel in any way.

Trial Examiner Norwood: No, I am allowing this motion that appears in the record already and specifies the testimony of this witness to be struck, and the 32960 testimony of the exhibits to be struck, and he has included, then, his own exhibits relating to costs put in on the T.V.A. project, and so on.

So, with that inclusion, I shall allow the motion.

Trial Examiner Norwood: My idea is to eliminate the cost matter entirely from here on, and from here back.

Mr. Werle: I understand that; but the thing I had in mind is that Mr. Wooden made a motion this morning where he specified pages and lines—

Mr. Werle: —and, of course, we have not had an opportunity to look at it, and we haven't had an opportunity

to make a statement about it. I want the record to show that we have not had that opportunity yet; we have not seen the references yet.

Trial Examiner Norwood: I haven't seen them yet, but I feel sure that Counsel made it in good faith, and if we find that there was a mistake in it, and there is something that should not be included, I shall entertain a
32961 motion to correct that, yes.

Mr. Wooden: If the record now shows, as I understand it to do, that the witness' testimony, and the exhibits put in through him relating to the estimated costs of the Volunteer Company, and relating to the estimated costs of the T.V.A. proposed Government plant, are stricken under the statement that I made—

Trial Examiner Norwood: Yes.

Mr. Wooden: —and the motion that I made, I will have no further questions to ask the witness on cross-examination relating to this subject.

Trial Examiner Norwood: All right.

Mr. Wooden: But I think Mr. MacIntyre has a few on some other portions of his testimony.

Trial Examiner Norwood: All right.

It also includes anything that he has given this morning on the subject of costs.

Mr. Wooden: Yes.

Trial Examiner Norwood: Yes.

Mr. Wooden: Certainly.

Mr. Werle: Well, as I understand it now, there have been two—there has been one motion made to strike certain Respondents' exhibits and Respondents' testimony that Mr. Wooden made this morning, and Your Honor has granted that motion?

32962 Trial Examiner Norwood: Yes.

Mr. Werle: Now, in addition, Mr. Wooden has made some statements about deleting certain parts of exhibits put in by the Government. I merely wanted to ask whether that had anything to do with any testimony by Government witnesses? The references were only to portions of exhibits.

Trial Examiner Norwood: Yes.

Mr. Werle: Just so we understand the record.

Trial Examiner Norwood: Now, Counsel understands that our object here is eliminating costs. If we have not struck everything that should be struck, why, I assure you that I will entertain motions to add to it, and the

Counsel for the Commission has included certain exhibits that have not been specified, but he is to specify those, and if he does not specify all of them that you think should be specified, you make your motion to include them.

Mr. Werle: Well, I am not saying now that I want to make any further motion to include anything.

Trial Examiner Norwood: I understand.

Mr. Werle: But I would like to understand just what the state of the record is. There is so much evidence in here about T.V.A., not only in the form of exhibits but by testimony,—Dr. Morgan, Mr. Eckels, Mr. Garrity,
32963 and I believe there were one or two others,—and moving to strike certain unstated parts of those in a general way like this, to my mind is unsatisfactory, and I just want the record to show that we are not taking any position on it at the moment at all, except that we are confused, and we object to it until we see exactly what the motion is, and what parts of the testimony and what parts of the exhibits the motion is directed to.

Trial Examiner Norwood: Well, you may bring it up later if you want to.

Mr. Wooden: I would like to say in that connection, of course—

Trial Examiner Norwood: Yes.

Mr. Wooden: That it was wholly unintentional on my part not to make my statement all-inclusive as to all of those subjects. It would be an untenable position for me to move the exclusion of exhibit references to these subjects, and permit the testimony regarding the same subject to remain in the record. They stand on the same footing. I did not intend to draw any distinction.

Trial Examiner Norwood: The idea is to eliminate these costs, and we will clear the record of anything that should be struck in regard to the matter.

Now, this testimony of Dr. Morgan, and others, as to the effect of considering these things, and all, which
32964 go to other issues, you see, and anything that cannot be struck without eliminating testimony that should remain on the other issues, I will limit its application.

Mr. Werle: Well, that is the part that I do not understand, if Your Honor please; this T.V.A.—this whole T.V.A. story, all of the evidence is just—it is permeated with this question of cost and fair price. Now, if certain

parts of that are going to be subject to a motion to strike at this time, it leaves us in a pretty strange position.

Then what is the evidence there for?

I have heard that this is supposed to be an administrative proceeding where we are dealing above board, and so on. I would like to ask Counsel for the Commission if they would just kindly tell us what this T.V.A. evidence means, what they are going to do with it, what we are supposed to meet. We thought we were supposed to meet costs, and the question of fair price, and we have done it, and I think that we have done it very well.

Now that we have done it they want to take it out. That is the thing that I do not understand, and I want to object to it.

Trial Examiner Norwood: I think that Counsel has told us. He has told us in his statement this morning his contention with respect to that T.V.A. matter, and
32965 all that he intends to draw from it.

Mr. Wooden: Your Honor, I would like to say that I think the ground I took in my motion,—the long motion that I stated this morning—

Trial Examiner Norwood: Yes.

Mr. Wooden: —is perfectly sound.

Trial Examiner Norwood: Yes.

Mr. Wooden: And I could stand on it, but I have consented to a more liberal position than I think is really required.

Trial Examiner Norwood: Yes.

Mr. Wooden: In order to avoid this interminable trying out of collateral issues.

Trial Examiner Norwood: I think that both sides are greatly benefited here by eliminating this cost question, and you can go ahead now.

No further examination of this witness, Mr. MacIntyre?

Mr. MacIntyre: Oh, yes.

Trial Examiner Norwood: Go ahead.

Mr. MacIntyre: But this would not be any testimony on that point.

Trial Examiner Norwood: Go ahead.

By Mr. MacIntyre:

Q. Major Lewis—

Mr. Werle: (Interposing.) Your Honor please,
32966 this is something new now. In the past, as I recall it, there have been statements made that examinatio

of a witness would be limited to a single counsel for one side, and we have got along pretty well on that basis, and I want to object now to switching Counsel for the Commission in connection with the cross-examination of this witness, unless there is some very good reason for it.

I mean, if we once start that thing, we are likely to have three and four and five people examining.

Trial Examiner Norwood: Yes. Well, under the circumstances, Mr. Wooden was absent during part of this direct examination here, and I think that the circumstances are different. Mr. MacIntyre can—

I think that Counsel for the Respondents have had two and three and four cross-examinations of the same witness heretofore.

Mr. MacIntyre: As I see it, there has been no cross-examination of this witness yet. There has merely been some negotiations with respect to clearing up the record as to certain testimony that he gave on direct, and not in that subjecting him to a cross-examination.

Trial Examiner Norwood: Yes.

I do not think it is unfair to the witness for the other counsel to examine him here, under the circumstances.

If they were opposing the right of cross-examina-
32967 tion, that would be another matter, but they are not.

Go ahead.

By Mr. MacIntyre:

Q. Major Lewis, on your direct examination your Counsel showed you Commission's Exhibit 547-3-W to 4-A, which comprehended minutes of a meeting of the Sixth District of The Cement Institute, the meeting being held in Knoxville July 17, 1935.

Do you recall those?

A. I recall a meeting. I suppose that is the date, Mr. MacIntyre, so far as I know.

Q. You state that you attended the meeting?

A. Yes.

Q. I believe you stated that you were not there throughout the entire meeting, or at least you arrived late, or left early. Do you recall your testimony on that?

A. I recall the fact, at least I don't recall the exact wording of my testimony, but I do recall that as a fact.

Q. That is, you were not there throughout the entire meeting?

A. I was not there throughout the entire meeting, yes.

Q. And that during that part of the meeting in which you were in attendance, I believe you stated that you did not hear the discussion that revolved about a statement setting forth the methods of marketing cement, such as is comprehended in Commission's Exhibit 547-4-D to 4-J, inclusive,—is that correct?

32968 A. What is that? A statement of what?

Mr. MacIntyre: Will you please read the question.

Trial Examiner Norwood: Read it.

(Last question read by Reporter.)

A. I believe I stated that I did not recall any such discussion. That is still my recollection.

By Mr. MacIntyre:

Q. That is as taking place during the part of the meeting that you attended?

A. Yes, sir.

Q. Do you recall who issued the invitation to you to attend this meeting?

A. No, it wouldn't have been issued to me individually; it would have come into our city office and be relayed to me by telephone.

Q. By whom?

A. Probably by Mr. Parsons. I don't know just whom.

Q. Your sales manager?

A. Yes.

Q. Do you know who issued the invitation to him for a representative of your company to attend this meeting?

A. No, I don't know anything about that, how the invitation was issued.

Q. Did Mr. Parsons leave the meeting with you?

32969 I believe the record shows he attended it.

A. I don't recall, Mr. MacIntyre, when he left.

Q. Did he enter the meeting at the time you did?

A. I think so.

Q. And you do not recall whether he left along with you?

A. No; I don't recall.

Q. Or afterwards?

A. I don't recall many details of the meeting.

Q. Do you recall any details of the meeting other than those that you discussed on your direct examination?

A. Oh, I recall vaguely that there was some discussion

of what the industry was going to do now that the Code was out, and some matters along—of that kind——which I was interested in in a more or less academic way.

Q. Who raised that question as to what the industry would do, now, since the Code is out?

A. I don't know. I recall vaguely there was some discussion of it.

Q. Isn't it a fact, Major Lewis, that Mr. N. C. Munday, the trustee for The Cement Institute for the Sixth District, raised that question?

A. I can't testify as to the fact; I can testify as to my recollection. I do not recall that he did. Mr. Munday usually said very little in meetings.

Q. You recall him being present at the meeting?

32970 A. I assume he was. There was quite a number of people there, Mr. MacIntyre.

Q. How many?

A. Oh, I don't know; forty or fifty, probably.

Q. That is, representatives of cement manufacturers?

A. Maybe twenty or thirty.

Q. Representatives of cement manufacturers?

A. Yes.

Q. Do you remember seeing Mr. George Reiter in that Chicago meeting?

A. I think he was there.

Q. Do you remember whether or not Mr. Charles Conn, the president of The Cement Institute during one year, was also present at the meeting?

A. I don't remember Mr. Conn, no.

Q. You have attended meetings in Knoxville, Tenn., at which he was present?

A. I don't recall any; no, sir. I think there were only two meetings that I attended at Knoxville. One was this one. Another one was a question of the allocation of business during the Code period.

Q. Can you tell us what was said about this question that was raised as to what the industry would do now since the N. R. A. had been declared unconstitutional?

A. I doubt if I could from my independent recol-
32971 lection. I saw the exhibit, and that did refresh my memory on the fact that these things were discussed. I recall some discussion, I guess later, in our own company as to whether we could continue to file prices. I believe, with the Trade Commission that was appointed.

Q. The question of price filing came up at the meeting?

A. It came up after at our own discussions.

Q. Did Mr. Parsons inform you that it came up at the meeting after you left the meeting that we have talked about?

A. I couldn't say that. It may have come up while I was still there. As I say, my recollection is affected by what I saw in the exhibit. I would have no recollection as to these things we discussed until I saw this exhibit. It may have been discussed while I was there.

Q. You have left the matter of marketing cement and policies as to the marketing of cement through the particular channels largely up to your sales manager, haven't you?

A. As far as all detail is concerned, yes.

Q. That is, as to whether particular sales be made through a particular person or class of persons, that would be left for him to decide as to detail?

A. I was not interested in the details.

Q. I say, on such matters as those you would leave the details to him; is that correct?

A. That is correct. I did not dictate any policies.

32972 I discussed it with Mr. Parsons.

Q. To what degree have you discussed with him the matter of what classes of business should be sold through particular classes of people or customers?

A. Well, we have discussed that from time to time, Mr. MacIntyre, over a period of years. You are referring to any special time now?

Q. Well, immediately after this meeting in July, 1935.

A. I don't recall any particular discussion we had at that time. We did discuss it, as I told you, from time to time all through the years we have been operating.

Q. How near to the date of that meeting did you have a discussion with him on that subject, as you now recall?

A. I have no idea.

Q. You can't tell whether it was within a week or a month or a year?

A. I wouldn't even say we had one since then, Mr. MacIntyre. I don't know.

Q. Or before?

A. I think we must have had one before. Yes, I think we did, because in the first Code hearing Mr. Hanahan and I attended the hearing in Washington; then we had dis-

cussed certain features of the proposed Code to which we objected. There were some details on marketing included to which we made a formal objection. But what other individuals, now, I don't know.

32973 Q. How close to the date of this meeting is the preceding date of the meeting that you had discussion with Mr. Parsons concerning this subject, the methods of marketing cement?

Mr. Werle: I object to that, Your Honor. We have had five minutes on how close to the date of the meeting. I think the witness has said several times that he does not recall any particular discussion on any date. He says they discussed it as a matter of company policy from time to time.

Trial Examiner Norwood: He can probe his memory about that and find out.

Objection overruled.

A. I thought I said a while ago I have no recollection whatever of any definite discussion or definite date as related to that meeting, or any other circumstance.

By Mr. MacIntyre:

Q. Well, you have told us about some instances preceding the meeting and during which you discussed the subject. I am just attempting to have you, if you can, tell us the date of the last such discussion, or approximate date of such last discussion, on that subject preceding this meeting.

A. I am sorry, Mr. MacIntyre, but I can't give you any. I can't even give you a guess on that.

Q. Have you attended other meetings at which Mr. Charles Conn, president of The Cement Institute, was in attendance?

32974 Mr. Werle: I would like to hear that question again.

Trial Examiner Norwood: Read it.

(Last question read by Reporter.)

Mr. MacIntyre: Strike out the word "other," if that is what he is going to object to.

Mr. Werle: That is exactly what I am going to object to.

Mr. MacIntyre: Now, read the question as it now stands.

(Last question read as follows:

"Q. Have you attended meetings at which Mr. Charles Conn, president of The Cement Institute, was in attendance?")

A. I attended a meeting in Chicago in March, '34, I believe, and I would say my recollection is Mr. Conn was at that meeting; yes, sir.

By Mr. MacIntyre:

Q. How many members of The Cement Institute and representatives of cement manufacturers attended that meeting?

A. Well, quite a considerable number; maybe a hundred, more than a hundred.

Q. Just about the entire industry?

A. I don't know about that, but there were quite a number.

Q. Who called the meeting?

A. I think it was formally called by the secre-
32975 tary of the Institute.

Q. That was a meeting of the members of The Cement Institute; is that correct?

A. I think so.

Q. Who presided at the meeting?

A. Mr. Coffin, who is now dead, was acting at the meeting. Whether he presided or not I am not sure.

Q. What was the principal purpose of that meeting?

A. It was to pass on the proposed plan for the allocation of available business under the Code—as proposed in the Code.

Q. Any other business that you can recall that was discussed at the meeting?

A. No. There was quite a discussion of that, as I recall it.

Q. Do you recall any of the other subjects that were discussed?

A. No. My purpose in being there was to take in the discussion, or at least study the discussion of that particular matter. We were very much interested in it. I doubt if there was anything else discussed, Mr. MacIntyre, as a matter of any formal procedure.

Q. Well, groups of the members who attended that meeting met more or less informally in group discussions after the meeting; didn't they?

A. There were group discussions for or against
32976 the proposed plan. I recall that.

Q. I am talking about outside of the meeting

itself, in the parlors of the hotel at which this meeting was held. Were there group meetings of the various members of the industry who were in attendance at the meeting generally?

A. I don't recall any in the parlors. I don't recall any such meetings.

Q. What about the rooms or the suites of the particular members who were in attendance? Didn't you attend group meetings in some such quarters?

A. I went to one man's room where we discussed our individual objections to the proposed plan.

Q. Whose room was that?

A. I can't tell you whose room that was. I can tell you one or two of the men who were there.

Q. All right.

A. I think Mr. Davis, of the Standard Cement Company.

Q. Standard Portland Cement Company?

A. Standard Portland Cement Company. Mr. Davis of our company; Mr. Weaver, possibly, of the Valley Forge; I believe Mr. Coy Burnett, who later presented his views in the general meeting.

Q. Mr. Coy Burnett was with the Monolith Company, of Los Angeles; is that correct?

A. That is right.

32977 Q. Do you recall any other group meetings held by groups of members of the industry who attended this Cement Institute meeting in Chicago?

A. That is the only one I know of, Mr. MacIntyre.

Q. Isn't it a fact, Major Lewis, that with respect to most meetings of the industry, particularly those of districts, as well as the national meetings of The Cement Institute, that you sent Mr. Parsons, your sales manager, instead of you attending them yourself?

A. You say isn't that a fact? No, I would not say that is a fact.

Q. Well, he attends meetings of The Cement Institute that you have not attended, doesn't he, both group meetings as well as national meetings?

A. Well, this particular one that I just mentioned he did not attend; I attended.

32978 Q. Well, not as a matter of rule, but it is a fact that he did attend some meetings of The Cement

Institute, and some meetings of The Cement Institute that you did not attend, is it not?

A. He naturally would. He was concerned with matters of The Cement Institute.

Q. Isn't it a fact that he did?

A. I don't know. I guess so.

32979 Q. Major, this morning you produced a statement showing total net sales for years for your company to one of your customers, the Tennessee Valley Authority.

Do you have a prepared statement, also, on total net sales as to all customers for those same years?

A. I think we prepared one like that, that they could use.

Q. Do you have that here with you?

A. Yes, it is here in the courtroom; Counsel has it.

Q. May we see that?

Mr. Werle: Your Honor, again we are—if this is not bearing on the question of fairness of price, then I do not know what it is. It seems to me that there ought to be some ruling on this situation one way or another.

Trial Examiner Norwood: Read the question.

(Record read by Reporter.)

Trial Examiner Norwood: I think that was ruled out.

Mr. MacIntyre: No, Your Honor please, the Re-
32980 spondents have, through this witness and other witnesses, during their defense, attempted to show that as an inconsequential part of their business going to its customer the Federal Government, and its agencies—

Trial Examiner Norwood: Yes.

Mr. MacIntyre: —As beween these two documents we can determine just what part of this Respondent's business goes to this inconsequential customer, the United States Government, and it has not been touched upon here this morning.

Trial Examiner Norwood: I think that you may show that.

Mr. Werle: Or on direct.

Mr. MacIntyre: Oh, yes.

Trial Examiner Norwood: The objection is overruled.

(Last question read by Reporter.)

By Mr. MacIntyre:

Q. May we see the statement, Major?

Mr. Werle: As I understand Your Honor's ruling, we are required to turn it over?

Trial Examiner Norwood: How?

Mr. Werle: As I understand Your Honor's ruling, we are required to turn over this tabulation which the Major says is here,—is that correct?

Mr. MacIntyre: There is a question pending to
32981 the Major asking him if I may see the tabulation that he has prepared on this matter.

Mr. Werle: Well, it is not in his possession; it is in my possession.

Trial Examiner Norwood: Well, I think that was received in evidence, was it not?

Mr. MacIntyre: No, there are two tabulations, one showing the totals of his shipments to one of the agencies of the United States (indicating document). Now, the other tabulation shows a total amount of the customers, showing just what part—when the two are compared—went to this one customer, an agency of the United States Government.

Trial Examiner Norwood: That was a basis of his statement on direct examination, was it not?

Mr. MacIntyre: On direct examination Mr. Werle asked him several questions concerning quantities—

Trial Examiner Norwood: Yes.

Mr. MacIntyre: —of cement that he had sold to the T. V. A. on various projects.

Trial Examiner Norwood: Yes.

Mr. MacIntyre: And, as I recall the testimony that was given then was: "Oh, it didn't amount to a great deal, it fell far short of the estimates that had been given"—and some of the individual answers as to some of those
32982 projects of record is very confused. This would straighten it out, if we can get the facts.

Mr. Werle: (Interposing.) The only confusion is in the statement of Counsel.

Trial Examiner Norwood: Well, let Counsel state whether or not he will let the witness produce that.

Mr. Werle: Well, I objected to the question, in the first place, as to whether he had it, and I objected further to the question asking him to produce it; and, as I understood it, the objection was overruled. And if that is the state of the record, I have no choice. The paper is here.

Trial Examiner Norwood: Well, I think the Counsel should have it.

Mr. Werle: Well, if I understand that correctly, then, my objection to producing it is overruled, and I am asked to produce it.

Trial Examiner Norwood: Yes.

Mr. Werle: If that is so (handing a paper to Commission's Counsel).

(Commission's Counsel examine the document.)

Mr. MacIntyre: I would like to have this paper marked for identification, if you please.

(The paper was marked for identification "Commission's Exhibit 3244.")

32983 By Mr. MacIntyre:

Q. Major, I am showing you Commission's Exhibit, for identification, 3244, and ask you to state what it is.

A. That is a statement prepared by the secretary and treasurer of our company at my request, showing for each of the years 1933, '34, '35, '36, and '37, the record of the total barrels of cement sold, in barrels sold T. V. A., and the barrels sold other than T. V. A. It shows also the total charges for all cement sold, and separate items for cement sold to T. V. A. and other than T. V. A. Then it goes on to show the net return per barrel for each year, average for T. V. A., for other than T. V. A., and the total.

Q. I ask you a further question on the document: You have accepted the data as compiled there as truly reflecting the records of your company as to those shipments, then; is that correct?

A. Subject to possible human limits, yes.

Q. I ask you a further question: As to the shipments or records of shipments that your company has made to the T. V. A. and other customers, comprehended in this tabulation here, do the records of your company show whether they carry the total sales and freight element,—that is, on your journals and ledgers,—or does it carry the net that you have there after the freight has been deducted and paid by your customers to the railroad?

32984 Mr. Werle: That is objected to, because it is way beyond the direct. That question was not covered at all by this witness on direct examination, or anything remotely relating to it.

Trial Examiner Norwood: Read the question.

(Last question read by Reporter.)

Trial Examiner Norwood: Objection overruled.

That goes to this question of the proportion between the Government business and the other.

Answer the question.

A. Mr. MacIntyre, I know nothing about how those records were kept. They are not in my charge. I do not consult them. And I have never inspected them, that I can recall.

By Mr. MacIntyre:

Q. Well, did you ever see a journal or ledger account in your company that carried an item of total sales that included freight that was paid by your customers to the railroads?

Mr. Werle: The same objection to that question.

Trial Examiner Norwood: Overruled.

A. I saw last Saturday, in making up the report that Mr. Wooden requested, some journal cards covering our shipments to T. V. A. As I recall them, they showed the date, the invoice number, the charge, the discounts allowed, the net price paid by the T. V. A., and where there was prepaid freight there is a column for that.

32985 By Mr. MacIntyre:

Q. That was the case where you paid the freight?

A. Where we prepaid the freight that appeared on this ledger card.

Q. Now, have you ever seen in the journal or ledger account an item, one of the records of your company, as to total sales that carried freight that was paid by your customers to the railroads? That is, freight that was not prepaid by you?

Mr. Werle: I do not know whether Your Honor quite understands what is going on here, but these questions are asked with the pretense that that paper relates to them. This is a line of inquiry that Government Counsel have gone into on cross-examination of numerous witnesses, who testified what they considered their price, whether their delivered price or whether their mill net. Now, that is the purpose of this inquiry. It has nothing to do with the exhibit which he has marked, and I object to it on that ground; and, of course, it is way beyond the direct, as I said before.

Mr. MacIntyre: I think it serves to explain to a degree

items that are set forth on this tabulation as to the manner in which they are set forth.

Mr. Werle: How does it explain that? That is what I would like to hear.

Trial Examiner Norwood: Does it go to this
32986 question of what is economic price?

Mr. MacIntyre: It does not go to anyone's opinion as to that; it goes to facts from which someone sometime might possibly argue.

Mr. Werle: Exactly.

Mr. MacIntyre: But—

Mr. Werle: It is not covered by this witness.

Mr. MacIntyre: —we want to get the facts as they are, which would lead to an argument one way or the other. The only thing we are after are the facts. And now I am clearing up that explanation of this witness by facts that appear on this document.

Mr. Werle: It does not appear on the document that the witness has produced in response to a request of Mr. Wooden for cross-examination in connection with his direct testimony, and the direct testimony had nothing whatever to do with this subject.

Trial Examiner Norwood: His testimony did not go into this matter of price, did it?

Mr. MacIntyre: It went into the matter, though, of the proportion of business, and the amounts of sales that were made by this company to the Federal Government.

Turn to the record on that. There is considerable testimony that this witness—

32987 Mr. Werle: I have not disputed that we asked the witness some questions about the amount of cement shipped to T. V. A.

Mr. MacIntyre: This document covers it and shows the proportion of it.

Mr. Werle: I am not disputing the document. I am disputing the question being asked theoretically or presumably on the basis of that document, and the questions as asked go beyond the document and beyond the direct.

Mr. MacIntyre: I am merely trying to get an explanation of the document, which is now admitted to be within the purview of the direct examination.

Trial Examiner Norwood: But it is for some purposes cross.

Read the question.

(Last question read by Reporter.)

Trial Examiner Norwood: I think you are going outside of the direct examination on that.

Mr. MacIntyre: I will drop the line there.

Trial Examiner Norwood: The objection is sustained.

Mr. MacIntyre: But I think it would serve to explain the document.

We offer in evidence Commission's Exhibit 3244, a tabulation which shows, among other things, the total shipped by the Volunteer Portland Cement Company, total
32988 sales shipped to all customers, and those that were shipped to T. V. A., showing the proportions.

Trial Examiner Norwood: Yes.

Mr. Werle. We object to it as incompetent, irrelevant, and immaterial, and having nothing whatever to do with the subject matter of the witness' direct examination.

(COM. EX. 3244, was offered and received in evidence.)

32989 Q. Yes.

Referring to Commission's Exhibit 1339, I believe you told Mr. Werle that one reason you did not bid on that—or the reason you did not bid on that invitation of the Federal Government—was because you considered the quantity indefinite.

A. I mentioned several reasons, I think. I don't think that was the controlling reason, as I testified.

Q. What are the other reasons that you stated?

A. Oh, well—

Q. Or that you have, for not having bid on that?

32991 A. In the first place, it called for—it brought up,
32992 rather, a problem in our storage, in that we would have to set aside certain bins, reserved strictly for such business as we might get under this special specification or invitation, and as we read it, with no assurance that we would be called upon to ship anything.

Another reason was that it stated that if we were given an allocation, or contract under it, we would be required to supply cement to any jobs that may have been under way, or were started, which were to be partly financed by Government funds. That made it extremely difficult, as suggested in your first question.

In addition to that, it upset our—it tended to upset our dealer contacts, because it would mean that business we were already handling through our dealers would be snatched away from them, and a man would drive up to the

mill in a Ford truck and say, "Put this cement on my truck."

And, finally, in addition to these—and possibly a few others that I have overlooked—the period of the contract was for a very short time, four months. It meant upsetting our whole procedure for a possible contract—for possible shipments under a contract—for a very short period of four months, which would tend to break down relations we had established over a period of ten years.

I think that those are the principal ones that we had in mind, Mr. MacIntyre.

32993 By Mr. MacIntyre:

Q. Now, coming to that third reason, Major, you stated the indefinite quantity was one. Does not the invitation permit you, or didn't it permit you and your company to name a maximum quantity on which it desired to bid,—anything up to three million barrels?

A. Now, it seems to me it did. It seems to me, further, it said that even though we put in a bid for our particular zone, there was no assurance we would get an allocation of it, because somebody in an adjoining zone might have a price to come into our zone and take away all the business from us.

Q. But you wouldn't in that case have had to have accepted an award beyond what you bid—that is, on a quantity beyond what you bid on; is that correct?

A. Oh, I suppose that is the case. I could read this and tell you definitely (referring to document).

Q. Now, as to your assurance of getting any business as the result of a bid that you might have submitted, do you have any assurance of getting business on bids that you submit to States when you submit the bid?

A. Well, that was not the way I put it, as I recall it. I said if we were given a contract there was no assurance that we would make any shipments, as I recall. It was not a question—

Q. Where do you find that in the invitation—

32994 that once had you been given a contract to ship certain cement that they would turn around and not ask you to ship? Can you find that in the invitation (handing document to witness)?

A. Give me time.

Q. I would like to have you point it out. I have never been able to locate it. (Referring to document)

The Witness: Your Honor, I will read this whole thing and find out what Mr. MacIntyre wants (referring to document).

Trial Examiner Norwood: Well, if you can show him where that provision is, you may do so.

The Witness: Here is one reference, Mr. MacIntyre, in paragraph 2:

"Cement will be ordered from time to time in such quantities as may be needed, as it is impossible to
32995 determine the precise quantities of different kinds of cement described in the specification and proposals for supplies that will be required during the contract term, each bidder whose bid is accepted will be obligated to deliver all cement of the kind contracted for that may be ordered from him during the contract term."

They make no promise of giving him any orders.

By Mr. MacIntyre:

Q. That is more or less a requirement of contracts for a period of three months, isn't it, Major?

A. I don't know what a requirement contract is, Mr. MacIntyre.

Q. Haven't you entered into requirement contracts with concrete block manufacturers to supply them with all of their requirements for a period of three months?

A. Not that I have had anything to do with the handling of it.

Q. You don't know anything about it?

A. Oh, I have heard loose phrases about—what is it now? You will have to remind me now what the phrase is; I can't tell what the phrase is. I think there is some arrangement whereby we agree to take care of a county, or a State, maybe, or a railroad.

Q. For a period?

A. Yes, something of the kind.

Q. Three months to twelve months?

32996 A. I don't know.

That is, you enter into a contract for their requirements for that period, and you would not know, of course, whether or not that due to economy, appropriations, and so on, that they would buy any cement, would you?

A. Well, most of that cement is just open cement. We don't store it in tested bins. It is just run of the mills—get an order for a car of cement, we ship it.

Q. That is entirely another question, as to whether or not you know; that is, from the question of whether or not you know how much they would take under the requirements contract isn't it?

A. But this set up here requires us to set aside so much cement, with no assurance that they would take it after we set it aside, as we read it.

Q. Is there a requirement in there that if you do make a contract that you must set aside all the cement that you contracted to furnish?

A. It is in this—because we will be obligated to deliver all the cement contracted for,—and going a little further, in the quantity we agreed to ship it. Therefore, we must have it ready.

Q. You were getting down to something definite, though, by the time you got down to the contract that was provided in the invitation?

32997 A. We didn't find anything very definite in this, Mr. MacIntyre, as I recall it.

Shall I read it further and see what else I can dig up?

Q. If you will recall another provision you would like to explain as to why you did not bid on it, yes.

A. The reasons stated in the letter are the reasons we did not bid.

Q. You didn't have any others; is that correct?

A. No, we did not.

Q. I believe your letter stated—

A. I don't recall any other reasons, Mr. MacIntyre; certainly there were no hidden reasons.

By Mr. MacIntyre:

Q. Well, now, referring to Respondents' Exhibit 2198-A and B, can you point out to me any explanation of your refraining from bidding on this invitation because it called for bids f. o. b. mill (handing document to witness)?

A. Well, let us see—I will read that now.

32999 The Witness: Your Honor, there is no reference here to any objection on that basis. There is a statement, as I testified verbally to Mr. MacIntyre a few minutes ago, that the condition of the invitation would possibly require us to load a considerable amount of cement on trucks at our mill. Our plant is not equipped, and so forth, to make shipments. I said nothing

33000 about f. o. b. mill.

By Mr. MacIntyre:

Q. Did you give that question any consideration when you considered this invitation?

A. Mr. MacIntyre, we studied the matter carefully. We were concerned about it. We finally wrote this letter explaining our reasons for not bidding.

Q. Wasn't that one of the reasons that you did not bid, because that invitation called for f. o. b. mill bid?

A. No, I wouldn't say that was one of the reasons at all.

Trial Examiner Norwood: Is it your policy to refrain from selling f. o. b. mill?

The Witness: I testified, I believe, Your Honor, that we had no ironclad policy as to that, and that we had at times bid f. o. b. our mill.

33001 By Mr. MacIntyre:

Q. You testified at length on direct examination concerning truck deliveries from your mill. What did you say was the reasons that you did not bid on this 1339—Commission's Exhibit 1339—with respect to the trucking question?

A. What is 1339?

Q. That is that invitation call,

A. The bidding?

Q. Yes, sir.

A. I said—as stated in my letter, we have no
33002 facilities for loading trucks. As we read the invitation, they put on us the duty of loading trucks for any little Government job that came along, if they drove up with the truck.

Q. Well, isn't it a fact that such trucking as you do permit from your mill is permitted—that is, with minor exceptions—is permitted on a basis of delivered price quotation?

A. No. I think I testified that we had done it at some time, and other occasions we have given a price at the mill. In case of local dealers I think I testified that in an emergency sometimes they simply drive up, take the cement at the Knoxville price; other times we load the cement in our truck. There were no fixed practices of that, Mr. MacIntyre.

Q. Well, can you recall any instance now where you delivered to trucks at your mill since 1932 at any other than a delivered price quotation basis?

A. Oh, yes.

Q. When?

A. We delivered, I think I testified, about 1,400 barrels to T. V. A. at f. o. b. price.

Q. Any others?

A. Possibly. I am not certain about the others.

Q. Well, I recall the T. V. A., but that was the contract with them.

A. We had f. o. b. contract.

Q. Was there any other customer to whom you
33003 delivered since 1932 to trucks at your mill on any other than a delivered price quotation basis?

A. Mr. MacIntyre, I would say I think so, but I would hesitate to make a definite statement. I am not familiar enough with it.

Q. You do recall plenty of instances where you delivered to the Knoxville dealers on the basis of the Knoxville delivered price?

A. That is my understanding. I have not checked it, but that is my understanding,—either by our truck or by their own truck.

Q. You testified about a special price that you quoted to the trade in Knoxville, Tenn., during 1931. Do you recall that?

A. Yes, sir.

Q. And I believe you also testified in that connection that your competitors after you had made such a special price immediately lowered their prices to that level.

A. I am not quite clear, Mr. MacIntyre, whether it was establishing a lower price or continuing a given price in the fact of a general increase in the market. In any event, it amounted to a lower price for Knoxville from our mill. And the purpose, I think I explained, was to get more of the Knoxville business for Volunteer.

Q. But after you made this special price for
33004 Knoxville, Tenn., didn't you find that one of your competitors established a new so-called basing figure that was at least as low as the Knoxville price for the Knoxville territory and for all other territory figuring back to the common base?

A. No, I don't think I testified to anything of the sort.

Q. Well, the cut in the price that was made by the competitor after you had made this special price in 1931 resulted in a lowering of the price over a wide area, didn't it?

A. No, I think that is entirely incorrect.

By Mr. MacIntyre:

Q. Well, what is correct on that?

A. I think they simply met this special price for Knoxville and let it go at that.

Q. Over what area did the Knoxville price, as met, extend?

33005 A. Possibly within the limits of the City of Knoxville, or possibly included in Knox County. I am not clear on that. A small area.

Q. And how much, if any, below the applicable basing-point formula for that territory did that run?

A. Well, what is the basing-point formula?

Q. The applicable basing-point figure plus freight to Knoxville.

33006 A. I don't know anything about any price at Knoxville at that time established by any basing-point formula. I know there was a market price there, which we reduced either by straight reduction or by quoting a lower figure during that period. Where the basing-point formula comes in, I don't know.

33009 Q. Just before noon I believe you testified that you could not recall the date on which you last had a discussion with your sales manager on the subject of the method of marketing cement as to classification of customers with your sales manager just previous to this meeting in Knoxville on July 17, 1935.

Now, how can you reconcile your testimony on that point with that that you gave on direct to the effect that your company did, during a short time before that meeting—that is, during May or June—issue a statement as to its policy on methods of marketing?

A. I don't think that I have to reconcile it. I don't know what you mean.

Q. Well, on direct examination you told Mr.
33010 Werle that it was some time during early summer, May or thereabouts, 1935, your company issued an announcement of its policy as to the methods of marketing cement.

A. I did.

Q. Do you recall that?

A. Yes, sir.

Q. Just how long before this meeting of July 17, 1935, about which you were testifying this morning, was that announcement made?

A. As I recall, it was made on May 1st.

Q. That is—

A. That would be two, two and a half months.

Q. Two and a half months?

A. Yes.

Q. Was that discussed in your organization before it was issued?

A. Oh, I would say certainly.

Q. That is at least one instance before this meeting that you did have discussions in your organization concerning the policy as to the methods of marketing cement; is that correct?

A. I don't mean to imply that we had any discussion on May 1, 1935. I can't give you the date of any discussion that I ever had with Mr. Parsons; but I can tell you that I had many of them. Dates will not be anything that I can try to remember.

33011 Q. Can you recall that you did have any between May 1st and the date of this meeting?

A. I don't recall the date of any of them, Mr. MacIntyre.

Q. I am calling your attention again to Respondents' Exhibit 2187. I believe you stated on your direct examination that the territory that is outlined in green ink and lined with green ink—

Is it green ink?

A. Green, yes.

Q. (Continuing)—is the territory over which you solicit and ship cement—solicit business and ship cement.

A. I said that was roughly the territory in which we solicited business, yes.

Q. And within that smaller area, within that (indicating), which is outlined—

What is it, yellow?

A. That is brown.

Q. (Continuing)—brown ink, and also lined with brown ink is the territory in which you have a freight advantage over your competitors.

A. That outlines it. That does not exactly delineate it. The line is in some cases a little further than the actual point, to show what is included and what is not.

Q. But approximately?

A. Approximately, yes.

33012 Q. You have put that on the exhibit for the pur-

pose of showing that as a territory in which you have a freight advantage haven't you?

A. Yes. That is the only thing I was very much interested in. And I think I testified I made it up for Mr. Werle for this hearing.

Q. And you put the green ink outline and the other lines for the purpose of showing the territory over which you ship and solicit business?

A. Yes. The whole map is a graphic representation of Volunteer's location of business.

Mr. MacIntyre: That is all, Major.

Redirect Examination by Mr. Werle.

Q. Major Lewis, on Commission's Exhibits 3243 and on Commission's Exhibit 3244, showing the nets of your company on T. V. A. business and on your other business, there is a variation from year to year.

Can you explain to us about those variations, what caused them?

A. Yes, sir; I think I can do that roughly.

The year 1933 was the worst year in our history, lowest shipments, and I believe lowest net. There was very little market at home. We were shipping at some distance.

33013 During 1933 on our T. V. A. shipments we had no contract. They bought some from us in paper at the commercial price at Coal Creek, Tenn., Coal Creek being a short distance from our plant.

In '34 until the May 15th contract we made with T. V. A., we continued to ship T. V. A. at the commercial Coal Creek price, and thereafter shipped them on the basis of $1.65 net at our mill for bulk.

In 1935 we continued shipping to Norris Dam under a new contract entered into in the fall of '34. And I should have said that part of the 1934 shipments were under that new contract, October 15th.

I believe all shipments in '35 to T. V. A. went to Norris Dam or to the Norris area.

In 1936 the heavy part of the Norris Dam was completed but we continued to make shipments to them for various small work they were doing throughout the Norris area. But the fact that much of the shipments in 1936 to Norris was in paper bags gave us an advantage in mill net of 5 cents, that we provided for in the contract. In other words,

for bulk we received, a definite figure. For paper we got 20 cents, 15 cents for bags and 5 cents for packing, which accounts for the slight increase in the mill net for '36 over '35.

In '37 we still shipped a few small lots, I believe, to the Norris area, and I think that we began shipments of small lots in paper bags to the Hiwassee Dam, and our
33014 net under the contract at Hiawassee was considerably lower than it was at the Norris. That brought about a reduction of the average net.

Does that answer your question, Mr. Werle?

Q. I think it does substantially.

Now, then, will you explain the variation, if you can, between the nets on T. V. A. business and the nets which you were obtaining on your other business? I notice there is a variation throughout each year.

A. I explained that, I believe, for '33 in reply to your other question.

In 1934 our commercial business was closer home. I believe the quantity was pretty much the same as for the previous year.

In 1935, well, the average of our other business is a little further out from home, and that continued apparently in '36 and '37. There may have been some market price changes in there, Mr. Werle, that I did not know about. That would be my interpretation of it. It is a question of a location of a market,—where the center of gravity of a market is, if I may put it that way.

33015 Q. Major Lewis, I show you Respondents' Exhibits, for identification, 2361-A, B, and C, and ask you whether or not that represents the records of your company which you used in connection with your preparation of Respondents' Exhibit 2190.

A. Yes, sir. Those are reports which I used in connection with this—with the preparation of Exhibit 2190.

By Mr. Werle:

Q. And can you tell me whether or not you used those same records in connection with your preparation of Respondents' Exhibit 2194-A and B?

Mr. MacIntyre: If Your Honor please, I just want to call your attention that the previous question was beyond the cross. It relates to matters that were not gone into on cross. It relates to an exhibit that was gone into on direct, which was excluded, which is not in evidence; and

now the last question goes to data that relates to this cost compilation, that we understand is going out of the record, and about which we asked the witness nothing on cross.

Mr. Werle: The fact is that I am identifying
33016 and I do not propose to offer—I merely want to get my record straight—the papers which we had here this morning, which related to these Respondents' exhibits, as papers which Major Lewis used in preparing these, and I am merely identifying them for the purpose of the record. I do not propose to ask any questions about them. I do not propose to go into it at all.

33017 Trial Examiner Norwood: Well, were those papers offered to the Commission's Counsel?

Mr. Werle: They were offered to him this morning, Your Honor; yes, sir.

33018 A. 2361-A, B, and C, I did not use them in the preparation of Respondents' Exhibit 2194-A, B, but as a test to check the accuracy or the fairness of some of the assumptions which I did make in this Exhibit 2194.

Q. Will you tell me, Major Lewis, whether or not Respondents' Exhibit 2362 is a record of your company which you referred to or used in any way in connection with Respondents' Exhibit 2194-A and B (indicating)?

A. I used Respondents' Exhibit 2362 to produce certain figures which I put in the tabulation as Respondents' Exhibit 2194-A and B; yes, sir.

33019 Q. Now, as to Respondents' Exhibit 2195, Major Lewis, which related to certain alleged increased costs (indicating). I show you again Respondents' Exhibit 2361-A to C, and also Respondents' Exhibit 2363, all for identification, and ask you whether or not those are the records which you referred to in connection with the preparation of them (handing documents to witness)?

A. (Examining documents.) For the preparation
33020 of Exhibit 2195, I did use Respondents' Exhibit 2363 (handing document to Counsel).

Now, just a moment and I will tell you about the others. As for Respondents' Exhibit 2361-A, B, and C, I did derive certain figures from them, and used them in Exhibit 2195.

Q. Now, Major Lewis, in connection with the preparation of Respondents' Exhibits 2195, 2190, and 2194, did you have occasion at any time to use or refer to profit and loss statements of your company, or your company balance sheets (handing document to witness)?

A. I did not.

Q. With respect to any of the testimony that you gave on direct examination, was any of that based on your profit and loss statements, or your balance sheets?

A. I did not consult any profit and loss statements at any time.

33021 Q. Or balance sheets?

A. Or balance sheets.

33030 HARRY C. KOCH, thereupon resumed the stand and testified further as follows:

Direct Examination (Continued) by Mr. Brick.

33031 Q. Yesterday afternoon, at closing time, Mr. Koch, you told us that you applied your policy as far as your sales in the United States were concerned, that is, your policy relating to your refusal to sell your product to dealers who deal also in imported cement, and that was about 1926.

A. That's correct.

Q. Now, I ask you if you sent out announcements to your trade at that time announcing your policy?

A. We did.

33037 Q. Bearing that in mind, what was the nature and substance of the announcement which you caused to be sent to your trade in November of 1926 in connection with the refusal of your company to sell your product to customers who were dealing in imported cement?

33038 A. Our policy was, as announced, that we would not sell our product to those who availed themselves and were selling in competition with us the products of the European countries produced under certain conditions.

Trial Examiner Norwood: On what date did you issue that policy to your trade?

The Witness: We broadcast that policy in the East and South in November of 1926.

By Mr. Brick:

Q. Mr. Koch, was that the same policy which you had previously applied in connection with your plants in South America and Cuba?

A. It was the same policy that we had used.

33039 Q. Did you continue to apply that same policy subsequent to 1926?

A. We republished it in our pamphlet—oh, I think it is "Ethics and Marketing Policies."

Q. Mr. Koch, in 1926 did dealers make any request of your company with regard to action which they thought you should take in connection with the importation of cement by your customers?

A. They wanted help from us to protect their sales on domestic cement to the user.

Q. And did customers write to you covering that subject?

A. They did.

33044 Q. Mr. Koch, after you sent out your announcements in November of 1926, what was the reaction of your dealers in so far as it was expressed to you?

A. My recollection is that it was favorable to the majority. There were a few that felt otherwise.

33048 Q. Mr. Koch, what was the nature and substance of the letters received by your company with reference to approval or disapproval by customers of the announcement you made in November, 1926?

A. The majority of them approved our action. There were a few that did not see how we could enforce that policy.

Q. And was that the general reaction of your customer trade?

A. It was.

Q. Did you receive any expressions of disapproval from your customer trade in connection with that policy in November, 1926?

A. We received nothing that I recall that disapproved of the policy, but they did not see how we could enforce it individually.

Q. Now, on applying that policy, Mr. Koch, do you recall any particular instances that arose where it was
33049 necessary for you to refuse to sell to customers?

A. Yes.

Q. Will you state first the locality and then the time, then explain the circumstances.

A. There was one in Boston with the Portland Stoneware Company some time during the early part of 1927. There was one with the Booker Company at Tampa, Fla., some time during the same year as I recall.

Q. Yes, sir.

Now, will you explain the circumstances relating to the situation, first at Boston?

A. In what respect?

Mr. Wooden: What time?

Mr. Brick: Well, the witness stated his policy was applied and they refused to sell in 1927 at Boston, Mr. Wooden.

By Mr. Brick:

Q. What circumstances arose in Boston in 1927 with regard to the enforcement of your policy?

A. You mean so far as the Portland Stoneware Company is concerned?

Q. Yes, sir.

A. Well, they tendered us some business and we declined it, in keeping with our policy.

Q. Yes, sir.

33050 A. And, as I recall, we likewise made a reduction in our price in Boston to assist the dealers that conformed with our policy.

Q. At that time, in 1927, did you find that your competitors were or were not following a similar policy?

A. They were not, so far as I recall, at Tampa, Fla.

Q. Did your competitors follow the reduction in price made by your company in Boston?

A. They had to if they wanted to get any business.

The Witness: Did that yield us a profit?

Trial Examiner Norwood: Yes.

The Witness: Oh, I couldn't say as to that, Your Honor. I don't know as I am just qualified to say what yields a profit or what does not, but, at least, we were—

Trial Examiner Norwood: Was it satisfactory business?

The Witness: Well, I would rather have other business, but I wanted to remain in that market.

By Mr. Brick:

Q. Well, what was your purpose in wanting to 33051 remain in that market, Mr. Koch?

A. We had dealers, we didn't want to abandon the market. We never know when a market will return to better conditions. Our experience in other markets has taught us that you withdraw from them, and it is harder to get back again when you are ready to go, and I think I testified on that previously.

Q. To what extent did you reduce the price at Boston at the time you mentioned?

A. I am not sure whether it was 20 or 25 cents a barrel.

Q. Do you serve the Boston market from your Hudson mill?

A. Yes. At that time that's the only mill we had in that section.

33052 Q. Now, Mr. Koch, what were the circumstances relating to the situation that you mentioned at Tampa, Fla.?

A. During the Florida boom of 1925, 1926, when buyers there were unable to get cement that they wanted, we took particular pains in shipping a cargo from our Houston plant to Tampa to Mr. Booker.

Q. And who was Mr. Booker?

A. Mr. Booker was a large dealer in Tampa who handled American cements whenever he could, and foreign cements when they did not please him—when the American product did not please.

Q. Did you or did you not supervise the action taken by your company in connection with these situations at Boston and Tampa?

A. The action taken was under my instructions or supervision.

Q. Now, you mentioned a situation at New Orleans. Will you tell us the circumstances relating to that.

A. During 1927 we brought into being our New Orleans plant. We served notice on our trade there, or had
33053 previously, of our policy. The largest individual dealer in New Orleans, or largest firm there, Jalincke Service Corporation, were well known to me, I had known the family for years.

We found that they were handling foreign cement, and I made a trip to New Orleans, had a heart-to-heart talk with him. I returned to New York, consulted with my superiors, and, much as I regretted to take the action, I had to notify them that they could no longer have Lone Star, my reasons for that being that I had put out a policy, I felt it encumbent upon me to enforce it or withdraw, and I knew, through my conversations, that all other dealers in New Orleans thought that I did not have the stamina to enforce it; but we did.

Q. Now, in connection with the situation you explained at Tampa, Fla., relating to your business with Mr. Booker, did you give the instructions as to how that situation should be handled to your sales manager at Birmingham?

A. Oh, yes.

Q. Was your sales manager at that time R. M. Walker?

A. It was.

33055 Q. Do you recall, Mr. Koch, the instructions which you gave to Mr. Walker concerning the transactions which you wanted him to cover with Mr. Booker?

A. I wanted to bring to Mr. Booker's attention our policy letter; I wanted to bring to Mr. Booker's attention why we issued that letter; and I wanted to bring to Mr. Booker's attention our feeling, and that just because he was Mr. Booker we were not going to deviate from that policy.

Q. This was in 1927?

A. That's right.

Q. Now, Mr. Koch, do you recall the substance 33056 of the instructions which you issued to Mr. Walker?

In other words, you have told us that you sent him a letter covering the instructions—you have identified the letter—but without referring to it can you tell us what the instructions were which you issued to Mr. Walker?

A. Well, my instructions were that we would make no deviation whatsoever from our policy.

Washington, D. C.,

33057 Wednesday, February 21, 1940.

33058 Mr. Werle: Just before Mr. Koch begins his testimony again today, Your Honor, could we find out from Mr. Wooden, on the record, when he will have ready the particularization of his motion to delete certain evidence in connection with T. V. A.? The sooner we could have that the better.

Mr. Wooden: You mean the evidence that is in the record in the form of Commission's exhibits and testimony?

Mr. Werle: Yes. As I understood your motion, it has been particularized as to Major Lewis' testimony.

Mr. Wooden: Well, I made the best present statement I could yesterday on the subject. If it is necessary that we specify pages and lines of every particular document, and every line of testimony, why, that can be done, 33059 but I am not ready to do it now.

Mr. Werle: I did not expect you would be ready this morning, Mr. Wooden, but I would like to have some idea because—

Trial Examiner Norwood: I think that we can put that on the record at our next hearing, next week.

Mr. Werle: All right. It would be fine if we could, so that we have some notice as to what is in and what is not.

Trial Examiner Norwood: All of these figures that relate to cost.

Mr. Werle: And fair price.

Trial Examiner Norwood: Costs and fair price.

Mr. Wooden: Profits.

Trial Examiner Norwood: Price of any kind.

Mr. Wooden: Cost and profits.

Trial Examiner Norwood: And if it is not all specified on the record next week, I will entertain a motion to include anything else that we may have overlooked.

Mr. Wooden: I certainly did not intend to strike everything relating to price, Your Honor. Price was the big thing in this case, of course. It is cost and profits that I am talking about, and their relation to price.

Trial Examiner Norwood: I am referring to that, that is what I meant,—costs and profits.

33060 Mr. Werle: Well, as to that, just one further statement: As I understood our whole discussion yesterday, it was about costs and fairness of price. Those were the two items that were mentioned.

Trial Examiner Norwood: Yes.

Mr. Werle: Particularly price. Now, as I understood it, those are the parts of this evidence that Mr. Wooden has said he would delete, and that is why I am asking that we have some particularization pretty soon so that we can see exactly what it is.

Trial Examiner Norwood: That is, anything that would tend to show that the price is or is not fair.

Mr. Werle: Exactly.

Mr. Wooden: Your Honor, that is too broad a statement that you just made, because my position is that we are certainly free to contend that if the combination is shown by other evidence than that relating to prices and costs and profits, that we can then draw any inferences as to the status of that combination price that logic will permit.

Trial Examiner Norwood: Oh, you may show that costs bear no relation—that is, prices—bear no relation to costs, and I think if is—

Mr. MacIntyre: (Interposing.) The question of fair

ness of price may relate to two things,—may relate
33061 to a fixed price, or it may relate to one that has
a relationship to costs, profits, or losses.

Mr. Wooden: Or investment.

Mr. MacIntyre: Or investment, yes.

Trial Examiner Norwood: I was referring to all of those figures which show the costs of producing cement that were brought out in connection with that T. V. A. project.

Now, any other evidence that bears on the issue there as to whether or not there is any relation of price to cost, and the economic conditions, and to variations of demand, will not be struck, of course.

Mr. Wooden: Well, it will be clarified when we come to specify the particular parts.

Trial Examiner Norwood: Yes, I think that states it.

33067 Mr. Wooden: On February 13th, Mr. Withrow used pages 32236 to 32251 (referring to the official record) with offers to stipulate two things. First, that: "Proof of the existence of any agreement or understanding to allocate business or restrict production is not material or relevant to the issues in this case,"—and that certain specified exhibits and testimony,—"shall not be deemed to prove, to tend to prove, or have any bearing upon any agreement or understanding to allocate business or restrict production." That is page 32237.

The first part of this offer is equivalent to a proposal to abandon that charge of the complaint which says that

Respondents have used methods of supporting their
33068 alleged price combination other than those specifically described in the complaint. It is equivalent to a proposal that all such unspecified methods are immaterial and irrelevant to the issues, because nothing could be more material and relevant supporting for a price-fixing combination than restriction of production and allocation of business. So as a theoretical proposition, the offer of stipulation is so plainly unacceptable on this score as to raise a question as to why it was made and why it was placed in the record. Such an offer could not have been made with any reasonable hope or expectation that it could be accepted.

The second part of the offer is equally and patently unacceptable. It is equivalent to a proposal that all the

evidence in the record relating to restriction of production and allocation of business shall be deemed to have no bearing upon any agreement or understanding regarding such matters.

Mr. Brick: Pardon me, Mr. Wooden.

Trial Examiner Norwood: Let him finish his statement.

Mr. Brick: Let it be marked and handed to the Reporter.

Mr. Wooden: It is in rough draft.

Trial Examiner Norwood: Let him finish.

33069 Mr. Wooden: In other words, it is proposed that we agree such evidence has no probative value and should be sterilized.

I refer to just two exhibits among the many which the offer seeks either to exclude from or extinguish in the record. One is Exhibit 1270-B to J, inclusive, a letter which contains a detailed description of a meeting of Respondent Institute at which it was agreed that production would be restricted to 70 percent of the rated capacities established by W. S. Mallory, who was then the statistician for many Respondents, and who later became the official statistician for the Institute.

Another is a letter, Exhibit 2023, in which the president of a Respondent company wrote Mr. Mallory stating he had personally participated in allocating shipments in his territory and knew of 100,000 barrels so allocated during a few months before he wrote.

To ask that such exhibits be eliminated from the case by agreement is to ask Commission's Counsel to stultify himself and become a party to the suppression of that kind of evidence. In other words, such an offer could not have been reasonably made with any reasonable hope or expectation of acceptance.

Incidentally, let us not treat allocation of business and allocation of shipments as synonymous.

33070 As to the matter of allocating business, however, I offer to stipulate that the record does not show that the N. R. A. Code provision for allocation of business was carried into effect, and I shall make no contention that it was, on the present record.

I offer to agree to make no contention that the so-called Mallory plan, or the Storey plan of allocation of business as devised under the N. R. A. Code was put into effect. But the evidence regarding such plans and negotiations

is relevant and material to Respondents' general objectives and purposes and to the matter of their price and production policy in general.

Besides the offer to stipulate out of the case the evidence relating to production control and allocation of business, a third class of evidence is included in the proposal, although it was not mentioned in the comments of Counsel. It consists of evidence of Respondents' activities in opposition to the erection of new cement plants. Presumably this is to be deemed irrelevant and immaterial to the issues because not specifically mentioned in the complaint, or because the evidence itself is to be deemed to have no probative value.

The answer to the proposal on this matter must also be in the negative, and for the reason that it, too, is equivalent to abandoning the complaint as to proof
33071 or unspecified methods used by Respondents to support their alleged combination.

The offer to stipulate this evidence out of the case and to spread the offer on the record of February 13th is nothing but a gesture to offset the suggestion made in my letter to Mr. Leisure on February 3, that the recess be employed in an effort to stipulate uncontested factual matters.

33073 Mr. Brick: We take it we cannot make a statement with regard to the remarks made by Mr. Wooden as to the stipulation offered by us.

Trial Examiner Norwood: You may take it that the discussion is ended.

33074 HARRY C. KOCH thereupon resumed the stand and testified further as follows:

Direct Examination by Mr. Brick (Continued).

Q. Mr. Koch, do you recall the specific works contracts which we discussed yesterday or the day before? Those are the forms of your company.

A. Yes.

Q. Now, you are familiar with the provisions contained in those forms, are you not?

A. Well, yes, more or less. I had to do with the compilation of them originally. In late years I have not worked with them so much.

Q. Now, were any of those provisions inserted in your contract forms as a result of any agreement or understanding with any of your competitors?

A. Absolutely not.

Q. Were any of those provisions or conditions contained in those forms influenced or dictated by The Cement Institute?

33075 A. No.

By Mr. Brick:

Q. Mr. Koch, do you recall a time in 1935 that your company established special stock in Brooklyn from which dealers could load their trucks-

33076 A. Yes.

By Mr. Brick:

Q. Will you explain the circumstances, Mr. Koch, obtaining at that time in relation to the establishment of those stocks?

A. I think I testified that someone filed a special price for delivery to trucks at a particular locality in Brooklyn for the purpose of meeting the impact of foreign cement at that point. We had one or two barge slips under lease in that vincinity, and although we did not like the price, or the idea, if we wanted to keep our dealers in the running, and participate in any of the business, we met the condition.

Q. Did you supervise the action taken by your company in connection with the establishment of the stocks?

A. I had to do with the arrangements which later were carried out by my assistant.

Q. Now, how long did you keep those stocks at Brooklyn? In other words, for how long did you continue that operation?

A. We kept stocks there over a long period; however, the price—we only maintained the special price for something like six months.

Q. Did it extend from Brooklyn to points outside of Brooklyn?

A. Yes, it grew over a territory because, at first, we confined the deliveries, or, at least, endeavored to, to that particular locality, but, as anything else which is of a similar nature in our business, it spread over a very

33077 wide area, including practically all of Long Island, Westchester Counties, some Connecticut, and into New Jersey, I believe, about as far as Trenton—or, in-

stead of saying "I believe," make that "I recall" as far as Trenton.

Q. Now, Mr. Koch, did you find that that policy worked out successfully?

A. Well, it never did suit us, and when the other man withdrew it, why, we were glad to withdraw.

Q. In what respects, Mr. Koch, did you find the operation unsuccessful?

A. Well, I found it unsatisfactory, and I cannot tell why the other man found it unsatisfactory, but, to us, it was a very low net realized at our plant. It served
33078 as a point from which the trade drew its cement, and was carried back toward our mill, and in the territories where there had really been no impact of the foreign; and, therefore, resulted in lowering our net realized over the entire area that was served from that particular point.

Q. Was it successful, Mr. Koch, in keeping out foreign competition, or lessening the foreign competition?

A. To the best of my knowledge, no.

Q. Now, was there any agreement or understanding, Mr. Koch, between you or your company and any of your competitors with regard to these establishment of those stocks?

A. No, we couldn't agree to anything like that, under any condition.

Q. Did you have any agreement, or understanding, with any of your competitors with regard to taking the stocks out of Brooklyn?

A. We did not. We continued stocks but not the price.

Q. Now, in connection with other action taken by your company to meet the foreign cement situation, did you at any time try to get lower rates from railroads in order to meet that type of competition?

33081 A. Yes. We worked with the railroads asking—well, we plead with the railroads, asking for lower rates to assist in the various—

Trial Examiner Norwood (Interposing): Did they give them to you?

The Witness: They gave us a reduced rate from Houston to Corpus Christi; they gave us reduced rates from Houston to Beaumont; they gave us reduced rates, as I recall, from Birmingham to Miami, Fla. They did not reduce the rate from the Lehigh Valley to New York City,

but they asked permission not to make a 10 percent increase which had been granted by the Interstate Commerce Commission. They have declined to make any reduction in the rate from our Hudson mill to Boston.

By Mr. Brick:

Q. Mr. Koch, do you recall the price increase at the Ironton base of 25 cents a barrel in early February, 1930?

A. I have a slight recollection. There have been so many changes out in that section, but I recall one that was something like 25 cents.

33082 Trial Examiner Norwood: What was 2372?

The Reporter: That was a stipulation that was marked for identification the first thing this morning.

Trial Examiner Norwood: Please do not mark any more stipulations without you have permission.

The Reporter: Of course Your Honor will appreciate that when the documents are handed to the Reporter, the Reporter has no knowledge of what they are.

Trial Examiner Norwood: I understand.

Mr. Brick: I won't ask to have any more stipulations marked, if Your Honor please, without your permission.

Trial Examiner Norwood: Very well.

(The document was marked for identification "Respondents' Exhibit 2373-A and 2373-B.")

By Mr. Brick:

Q. Mr. Koch, do Respondents' Exhibits 2773-A and B, each for identification, refresh your recollection with regard to that situation (handing documents to witness). Will you kindly read those?

33083 A. Yes, Exhibit 2373 is a copy of a letter from our—

By Mr. Brick:

Q. There is no need of identifying it at the moment.

A. All right.

Q. Did you issue any instructions to your salesmen with regard to the application of the Ironton base at that time?

A. We did.

Q. Do you recall having received Respondents' Exhibit 2373-A (indicating)?

A. It came to my attention, yes; it was addressed to me; it would come to my desk first.

Q. Is that a copy of a report sent to you by Mr. Pierson, the vice-president of the company?

A. That is.

Q. And showing you Respondents' Exhibit 2373-B, I ask you if that document contains the instructions which you issued to your Indianapolis division (indicating)?

A. It does.

Mr. Brick: I offer these papers, if Your Honor please, being Respondents' Exhibits 2373-A and B (handing documents to Mr. Wooden).

Mr. Wooden: Your Honor, we object to these two exhibits, 2373-A and B, on the ground that they are
33084 cumulative and repetitive of the matters covered by the witness' oral testimony; and, further, that they are duplicative of the portion of the exhibit—or portion of the stipulation which we entered into on the first day of this week, Monday of this week. They are not writings of the witness who is on the stand; that makes them incompetent; and aside from that they are—

Trial Examiner Norwood: (Interposing.) Are there any—

Mr. Brick: Your Honor please—

Trial Examiner Norwood: Are there any objectionable statements in there, or arguments, or anything like that?

Mr. Wooden: They merely illustrate the point of getting information from dealers about price changes.

Trial Examiner Norwood: Yes. Well, I shall sustain the objection to them.

By Mr. Brick:

Q. Mr. Koch, in connection with the application of the Ironton base, which we have been discussing, did you issue any instructions to your sales department not to consider that base with regard to sales made in North and South Carolina, or Tennessee?

A. We did not. Our instructions were to let the base rum wherever it would, and to meet wherever it affected.

Q. And those instructions were included in the
33085 correspondence which you caused to be sent to your Indianapolis office; is that not right?

A. Correct.

Mr. Brick: Now, if Your Honor please, I reoffer Respondents' Exhibits 2373-A and B in the light of the additional testimony adduced from the witness, and I would like to call your attention to Commission's Exhibit 1189. I think Your Honor will immediately appreciate that the documents offered relate specifically to the document

which Your Honor received as that Commission's Exhibit 1189 (handing documents to the Trial Examiner).

33086 Trial Examiner Norwood (Interposing): Wait a moment. If Counsel will just answer to the point there. What connection have those two exhibits with this Commission's Exhibit 1189?

Mr. Brick: Just this: That it was the policy of the Lone Star Company to meet the competition of the Ironton base without any limitation or any exception, and that was the instruction sent by the vice president in charge of sales to the sales manager.

Trial Examiner Norwood: Yes.

Mr. Brick: And the Commission's Exhibit 1189 refers, in an ambiguous way, to some understanding. I personally think the understanding is intended to refer to an understanding among the Penn-Dixie officials, and does not refer to any other parties—

Mr. MacIntyre: Why can't we get the testimony of the witness?

Trial Examiner Norwood: Now, let him finish his statement, please.

Mr. Brick: But we raised that point at the time the offer was made by the Commission, and it went in 33087 over objection. Now, what we are endeavoring to do is to show through the testimony of the witness, and the actual papers which he wrote at the time—that is, actual acts made by him at that time—as to what his instructions were.

Trial Examiner Norwood: Now, this is the writing of some other people to explain that writing?

Mr. Brick: No, sir. Mr. Pierson is the sales manager for the division at that one point; he operates under the witness. The copy, the telegram copy, is the witness' instruction to his Indianapolis office telling them to meet the Ironton base.

Mr. MacIntyre: Your Honor please, the letter by Mr. Pierson that was just called to your attention—I believe it was 2373-A?

Trial Examiner Norwood: Yes.

Mr. MacIntyre: —you will note was not written by the witness. It was written to the office in which the witness is located in New York from a different part of the country.

Trial Examiner Norwood: Yes.

Mr. MacIntyre: It purports to state what some one told

that man in Indiana that someone else had in turn told him. It is hearsay to about the third or fourth degree.

Furthermore, the reply to that was not written
33088 by the witness, as you will note.

Trial Examiner Norwood: Yes.

Mr. MacIntyre: That is, the Respondents' Exhibit 2373-B—John F. Neylan—in the office of the Lone Star Company, replied to that.

Furthermore, as was pointed out by Mr. Wooden, there has been no foundation laid to show that the material itself is relevant or material, and since Counsel for the Respondents have referred to Commission's Exhibit 1189, it would, if it does anything, merely concern to a degree the evidence—the witness' testimony does—concern to a degree the evidence the Commission has put in that the Lone Star finally did permit the base to run its full course; whether there was any understanding or not we will have to look back to other evidence for that.

Mr. Brick: May I answer that?

Trial Examiner Norwood: I see no reason for— Yes, you had one speech on it. Now, what else do you want to say?

Mr. Brick: You asked me what else I wanted to prove.

Trial Examiner Norwood: Yes.

Mr. Brick: And I told you there were other things I would like to prove.

Trial Examiner Norwood: Well—

Mr. Brick: I would like to state, if Your Honor
33089 please, in connection with these exhibits, they are significantly probative, in that they demonstrate that the change of the base at Ironton came to the attention of Mr. Koch through a salesman, or sales-office, in one part of the country, and that he issued the instructions immediately to the salesman in the territory where the Ironton base would affect his price, and that it was a routine operation, and certainly these exhibits show, I would say, conclusively, that there was—could not have been any agreement with regard to the application of the base. It came in in the normal routine course to Mr. Koch, and Mr. Koch sent out his instructions without limitation.

Trial Examiner Norwood: Cannot this witness tell us about that? If that is a fact, can he tell us about that?

Mr. Brick: Well—

Trial Examiner Norwood: He was the one that issued the instructions, was he not?

Mr. Brick: Yes, sir; and if Your Honor, or the Commission, would say that they rely on Mr. Koch's testimony, accept it as representative of the facts of the transaction, of course I wouldn't have to corroborate it.

Trial Examiner Norwood: I see no reason for
33090 changing the ruling on that.

Trial Examiner Norwood: You may explain that exhibit in any way you can by competent testimony; but this is—

Mr. Brick: (Interposing.) Then the objection to the exhibit is sustained?

Trial Examiner Norwood: Sustained twice, now.

33093 By Mr. Brick:

Q. Now, Mr. Koch, when you started with the Sunflower Portland Cement Company in 1905, did that company have a rate book?

A. Yes; we compiled a rate book.

Q. And did you keep the rates which were compiled in book form or card form or what form?

A. In the office we kept our rates on a card; with the salesmen it was made, I believe, what we call loose-leaf books.

Q. Did the cards give the rates from only your mill to different shipping points, or did they give rates from competitors' mills as well?

A. There weren't so many mills then, but they
33094 gave rates from all sources of supply.

Q. Now, what difference, if any, was there between the cards kept by the Sunflower Company and the present freight rate book of the Institute?

33095 A. None, when we take into consideration the difference in mills. By that I mean the number of mills.

By Mr. Brick:

Q. Now, did the freight rate cards of the Sunflower Company quote the rates in cents per hundredweight, or in some other manner?

A. Always in cents per hundred.

Q. And in connection with the use of those cards, did you have a conversion table—

A. Always.

Q. —which translated those rates into barrels?

A. Yes, translated those rates into cost per barrel.

Trial Examiner Norwood: Do these bills of lading state the rate per barrel or per hundredweight?

33096 The Witness: Per hundredweight.

By Mr. Brick:

Q. Who made up the rate cards which you kept at the Sunflower office?

A. I did.

Q. How were fractional cents handled in connection with the application of the conversion table and the rates per hundredweight?

A. Well, when the rate per barrel figured in fractions, that part of the fraction below 5 mills was dropped, and 5 mills or above was considered one cent.

Q. Can you tell us from your experience in your railroad work whether that was or was not a practice in connection with such interpretations or conversions made by railroads in figuring freight charges?

A. Well, the railroads did not convert on a barrelage basis. Railroads figure that 100 barrels weigh 38,000 pounds, and the rate, if it happens to be 10 cents per

23097 hundredweight, would figure $38; but if their rates come out in fractions—I do not mean the rate came out in fractions—I mean if the full amount to be charged for on that carlot came out in fractions of a cent, they disposed of the fraction on the entire amount, as we dispose of it on the barrel unit, which is a common practice in all trades, I think.

Trial Examiner Norwood: Now, that was quite a difference, wasn't it?

The Witness: Yes; but over a period of time what tests, as I recall, that were made, did not amount to anything in the final outcome.

Trial Examiner Norwood: I mean, they just dropped the fraction of a cent on the entire bill. It might have been a carload.

The Witness: That is right.

Trial Examiner Norwood: One fraction of one cent.

The Witness: That is right.

Trial Examiner Norwood: And you would drop a fraction on every barrel in the car?

The Witness: That is right.

Trial Examiner Norwood: How many barrels did the average carload contain?

The Witness: When I started in the business, Your Honor, a carload minimum was 80 barrels; it was moved up to a hundred, and then, as it stands today, it is 132
33098 barrels, which—they don't make the minimum in the barrels, but that is what it takes to reach the 50,000-pound minimum.

Trial Examiner Norwood: Go ahead.

By Mr. Brick:

Q. Now, in connection with the tests which you made, Mr. Koch, what were your findings?

A. That there was only a few dollars' difference over a period of a month at any time, as to whether the company lost by that deduction or that addition.

Q. Now, when did you first encounter any published freight rate books?

A. When I came east from Texas to New York in 1922.

Q. And who published those first freight rate books which you encountered?

A. I found some old ones at our Knickerbocker subsidiary. That, as best I recall, came from, I think it was, Cement Manufacturers Protective Association, or something like that.

Q. Now, in connection with the freight rates which were compiled on the cards and used in the office of the Sunflower Company, was the use in connection with those cards any different from the use which you now make of the Institute freight rate books?

A. Not at all.

Q. And in connection with that do you consider
33099 their use by salesmen and also in connection with shipping and billing?

A. Oh, yes.

33100 The witness identified Resp. Ex. 2374 as a conversion table which a printer made for him from a typewritten copy such as the Sunflower Company used. He used it on his desk and has carried it with him since 1909.

(RESP. EX. 2374 was offered and received in evidence.)

By Mr. Brick:

Q. Mr. Koch, after you became associated with the Lone Star Company, and prior to the issuance of The Cement Institute freight rate books, did the Lone Star Company use freight rate books?

33101 A. We used the freight rate books that we compiled in our office, yes.

The witness identified Resp. Ex. 2375-A to Z-96 as a freight rate book used by the Texas Portland Cement Company when he was with them in 1920. The book is one used by a field salesman showing the rates used in computing his destination prices. It carried a conversion table as well as a list of base prices that were given to him, applying from their mills. When he first came to Texas the salesmen were traveling with a price list. He changed this to the method which he had always used.

33102 He recalled the date because the book had been given to him as a keepsake by a man who was with Texas at the time.

(RESP. EX. 2375-A to 2375-Z-96 was offered and received in evidence.)

33103 By Mr. Brick:

Q. You have stated, in the course of your testimony, Mr. Koch, that the Lone Star Company has in the past upon occasions compiled its own freight rate books?

A. That is correct.

Q. And those were books that were used by the Lone Star Company only, were they not?

A. That's right.

The witness identified Resp. Ex. 2376-A to 2376-Z-135 as a Lone Star freight book compiled in the company's Kansas City office, effective March 15, 1929, covering stations in the State of Nebraska.

Examination by Trial Examiner Norwood.

Lone Star used that until the Institute provided

33104 books in the Kansas instance in 1930 or 1931 or perhaps a bit later.

By Mr. Brick:

Q. Now, Mr. Koch, was it the practice of the Lone Star Company to have freight rate books such as Respondents' Exhibit 2376-A to Z-135 for each of its divisions?

A. Yes.

Q. Subsidiaries?

A. Yes, they were subsidiaries at that time, and each one is set up with its local management, including traffic, treasurer, and so forth.

Q. Were books of this character the kind which were used for shipping and sales purposes by your various subsidiary offices?

A. Well, this one, of course, happens to be the one that Kansas used (having reference to Respondents' Exhibit 2376-A to Z-135); but books of a similar make-up were used by other subsidiaries. They would not be similar so far as the points of origin, and so forth, and so on, is concerned.

Q. Yes.

A. But their form.

Q. Of the same character?

A. The same form.

33105 (RESP. EX. 2376-A to 2376-Z-135 was offered and received in evidence.)

By Mr. Brick:

Q. Now, Mr. Koch, in connection with the use of the rate cards which you have explained as being at the Sunflower office; did you have any agreement or understanding with any of your competitors with regard to the use of those cards?

A. No, I didn't know what competitors were using; had no idea.

Q. Now, in connection with the other freight rate books which we have discussed, those being the books used by the Lone Star Companies of the subsidiaries, was there any understanding or agreement with any of your competitors as to how those Lone Star freight rate books would be used?

A. Absolutely not.

Q. Now, in connection, Mr. Koch, with the freight rate books used by the Lone Star Company prior to the issuance of Cement Institute books, or books published by any other agency or group, who maintained and kept up to date the books which the Lone Star Company used?

33106 A. Oh, we had to do that in our offices.

By Mr. Brick:

Q. And that refers to the books which the Lone Star Company prepared for its own purposes, and no other company's purpose?

A. That is correct.

Q. And that was prior, I assume, to the time that you had the benefit of any books which might have been issued by the Cement Manufacturers Protective Association?

A. Yes, many years before that.

Q. Yes, sir.

Trial Examiner Norwood: Did you give any of the copies of these books to your retail customers?

The Witness: No, sir. We had no objection, though, in telling them that—

Trial Examiner Norwood: Did your competitors ever get hold of any of them?

33107 The Witness: No, because they were not out for distribution. I might make one exception there that comes to my mind; I did give a few cards to a dealer in Atlanta, about 1908, when I put in the destination price practice.

Trial Examiner Norwood: Yes.

By Mr. Brick:

Q. Now, with regard to the use which you or your various companies made of the different books we have had under discussion, can you state any differences with regard to the manner in which those books were used?

A. What do you mean,—in the manner as compared with what we do now?

Q. Well, either as compared with what you do now, or as compared with regard to the different books which we have discussed.

A. Well, the practice was all the same.

Q. Yes, sir.

A. I don't think of anything that varied.

33119 By Mr. Brick:

Q. Why did the Lone Star Company, Mr. Koch, subscribe to the Cement Institute freight rate book service?

A. Well, it was economical to do so; it saved us the work; they were in printed form, and, accordingly, saved us a lot of traffic expense.

Q. And, now, I think you have testified that prior to the time that the Lone Star Company had the benefit of the Institute written books, it published and kept up to date books prepared in its own offices?

A. Yes, that is what we—do you mean since we have taken that service?—

Q. No, sir; prior to the time that the Lone Star Company had the benefit of the Institute books, they made up and kept up to date it own books?

A. That is quite right.

Q. And those were prepared in the Lone Star Company offices, were they not?

A. In the different division offices, and a master price book kept.

33122 Q. Now, Mr. Koch, you were one of the officers of the Lone Star Company who gave consideration as to whether the Lone Star Company would subscribe to the Institute freight rate books.

A. Oh, yes. Certainly, traffic is connected with sales.

33123 Q. What factors did you consider, Mr. Koch, in arriving at your decision to subscribe to the Institute freight rate books?

A. Naturally, the factors of cost involved the ease with which we could perform the same service that we were performing through our own labors.

33126 Q. Mr. Koch, have you ever made any study of the comparative costs of the Institute freight rate books as compared with the books which were prepared and maintained by the Lone Star Company before they used the Institute books?

A. Most assuredly.

Q. In connection with that study, what did you find to be the saving which your company obtained through using the Institute books?

A. In excess of $30,000 per year.

Q. Now, on what do you base your figure of $30,000? In other words, explain how you arrived at that figure.

33127 A. I took the years following when we acquired properties, or when we brought them into existence, checked the pay rolls, which naturally come under my jurisdiction, of the traffic managers and of the clerical help—only such as stenographers that were involved—and then made a comparison with what our own traffic service costs us, plus the cost of the rate books as secured from the Institute.

Q. What did you find, Mr. Koch, to be the average cost of the Institute freight rate books?

A. I believe it was less than $1,200 a year for our entire property, domestic properties.

Q. Now, how many mills does that cover?

A. That covers ten.

Q. And does that cover all of the sales territory of the Lone Star Company in the United States?

A. Yes.

Trial Examiner Norwood: Do you mean $1,200 covered the service to all of your mills?

The Witness: That covers the cost of the books.

Trial Examiner Norwood: Yes.

The Witness: That, Your Honor, must be added to my expense of maintaining a traffic department, or dividing their labors.

Trial Examiner Norwood: Well, do you mean after you used the book you still maintained traffic depart-
ments?

33128 The Witness: You must have a traffic man around for general rulings; however, he need not be as high class a traffic man as a man who checks all the tariff rates and puts them into the books, and multigraphs them, or has them typed, and sent out to the salesmen.

Trial Examiner Norwood: I see.

By Mr. Brick:

Q. Now, in making your comparison, Mr. Koch, did you arrive at a direct cost for preparing and maintaining the books which were made up in your own office?

A. Well, I just took one stenographer's time to write the letters, to do the stenographic work, and, of course, there were times when we didn't have these ditto machines, or whatever they call them, so you just had to make many, many copies, and I compared them with what it is costing us today to carry—or did last year—to carry on the same business.

Q. Now, was your figure of $30,000 a net saving?

A. Well, that's the way I consider it. I think I list it as a difference, or something of that kind, but I figured it is a net saving.

Q. Have you any doubt in your mind as to the saving, which is made?

A. No.

Q. In other words, are you estimating the situation, or, as far as your own consideration of the problem is
33129 concerned, are you stating a somewhat definite figure?

A. Well, I have taken what I consider definite figures from the pay rolls; I could probably do it for slightly cheaper than it cost originally.

33131 Q. Mr. Koch, were you one of the officers of your company who considered the question as to whether

or not the Lone Star Company would subscribe to Institute books?

A. Yes, certainly. It comes under sales.

Q. In connection with that consideration, did you consider the savings which might be afforded the company?

33132 A. Well, of course, I considered that we would
33133 make savings. Otherwise, there would have been no purpose in changing the plan.

By Mr. Brick:

Q. Now, Mr. Koch, did you save as much as you expected to at the time you decided to subscribe to the Institute books?

A. As I recall, I really saved more.

Q. Now, in connection with the study you made of the situation to determine the actual savings that you did have, will you state the time that you made that study?

A. Well, I always give consideration to those things from time to time, generally at the end of the year. I do not always get them up in statement form, but—

Trial Examiner Norwood: Well, when did you make that study?

A. (Continuing.) Well, I made that study, I would say, before we subscribed to these books. I would say my first one was made in about 1929.

Q. Did you find any difficulty—

Mr. Koch, in connection with your statement that your company saved at least $30,000 by using the Institute freight rate books instead of preparing your own books, you mentioned that you have made a study in determining that figure; that is, the $30,000 figure. When did you make that comparative study?

A. For which, the $30,000—

Q. Yes, sir.

33134 A. —or more?

Q. The $30,000.

A. Well, as I stated, I usually make them along about the end of the year. I made one at the end of '39, along in December, thereabouts.

Q. All right, sir.

Ordinarily, Mr. Koch, is it or is it not difficult to determine the routes over which you ship your cement to a customer?

A. That has not been my experience. It is not difficult.

Q. Do you find that there are many points where there are no alternative routes?

A. Oh, great numbers of them.

Q. Now, where there are alternative routes do you have any difficulty in selecting the routes over which you make your shipments?

A. No difficulty at all. No difficulty at all.

Q. How does that work out where you have a situation of alternative routes?

A. Well, you know what railroad you are doing business on. You are originating the shipment. You know the railroad that the destination is on. The customer generally requests that. And you have rates that are applicable. You do not have to go to the tariff. You can insert the rate out of the Institute rate book, which represents
33135 the lowest rate between the points. You do not need to insert any intermediate routing. The railroad will route it for you.

Trial Examiner Norwood: Does it always represent the lowest rate between the points?

The Witness: What?

Trial Examiner Norwood: Does the Institute book always represent the lowest rate between the points?

The Witness: That is correct, Your Honor.

By Mr. Brick:

Q. Suppose you have a situation where you do insert the lowest rate to your delivery point on your bill of lading, and that bill of lading is turned over to the railroad, and is less than the rate which that line carries to the delivery point, what happens in that situation?

A. The railroad notifies you. The burden rests upon them if there is any consideration in the bill of lading which they are incapable of performing.

33136 Trial Examiner Norwood: I think that he can explain what he means by the burden.

The Witness: I mean, Your Honor, that has been my experience over the last 45 years of my life.

Trial Examiner Norwood: You mean you understand it is their duty to do that?

The Witness: That has always been my understanding, whether it is legal or otherwise.

Trial Examiner Norwood: And, as a matter of practice, they have always done that?

The Witness: So far as I know.

Trial Examiner Norwood: All right.

They notify you before making the shipment, do they?

The Witness: Yes. I don't even know where it came up.

33137 Trial Examiner Norwood: Do they require you to put the routing on the bill of lading?

The Witness: You can take a shipment of any kind down to the railroad, and they would not have to put any routing on; just show a destination and describe the property.

Trial Examiner Norwood: And include the rate; is that right?

The Witness: You don't even need to put the rate on.

Trial Examiner Norwood: They will in that case, or they have in that case made the most economical routing?

The Witness: Well, if you did that, I don't know where they would make the most economical routing, but they would get the shipment to destination in accordance with their tariff rate.

Trial Examiner Norwood: Yes. But suppose they had two rates?

The Witness: That seldom happens.

Trial Examiner Norwood: The different routings carry different rates.

The Witness: Those instances are rather rare, Your Honor.

By Mr. Brick:

Q. Now, Mr. Koch, extending that a little further, assuming that you put the description of your goods,
33138 the weight, and the lowest available freight rate on your bill of lading, without reference to any routing, then what happens?

A. If he can perform it under that contract, he would inform you so.

Q. In other words, as a matter of practice, in your experience, have you or have you not found that the railroads will always protect the lowest rate if it is stated in the bill of lading?

A. Yes. I don't know of any instances where we had to bring it to their attention. It is just routine.

Q. Mr. Koch, do you recall having had any conference with Mr. Duffy, of the Lehigh Valley Railroad, at any time?

A. I do not. I don't know the gentleman. I have no

recollection ever meeting him. We have no mill on their line.

Q. I show you Commission's Exhibit 1145, which was formerly Exhibit 1043-3-K, and ask you if the statement made in the fourth paragraph refreshes your recollection with respect to any conference?

33140 Trial Examiner Norwood: He has given testimony which categorically denies that paragraph, and for our convenience the number of the exhibit is in the record there, so the whole record is made on it.

By Mr. Brick:

Q. In September, 1931, Mr. Koch, were you or were you not permitting the loading of cement on trucks at

33141 your Norfolk, Nazareth, and Hudson mills?

A. My recollection is that we did not discontinue loading on trucks at those mills until mid-summer, or June, 1932.

Q. Did you have any agreement with any of your competitors that you would charge 15 cents a barrel, or make any other charge, in connection with loading cement on trucks at your various mills?

A. We did not, because we did not charge it at various mills.

Q. Did you have any agreement or understanding with any of your competitors with regard to any of the situations where you did make such a charge at your mills?

A. No, we did not.

Q. Now, at which mills did you make any extra charges in connection with deliveries to trucks at any time?

A. Well, we made, I believe, 6 cents at—we made, as I recall, 6 cents at Norfolk above the mill base. For a period of time, we charged 15 cents above the mill base at Nazareth and Hudson, but not always at Hudson. We did not—we sold at a delivered price and allowed the freight from our Indiana mill. We sold both ways at the Kansas mill, or Bonner Springs, part of the time; by that I mean, delivered price with freight allowed, and a mill base price, and at 15 cents over the mill base. There never were any charges made above the mill base at Dallas or Houston, or at New Orleans, in the couple of months' time that we permitted trucking, or that trucks called for, and we

33142 never had any trucks call at Birmingham.

Q. Did you have any uniform policy at any time,

Mr. Koch, in connection with your action relating to the extra charge for trucking?

A. No.

33143 Mr. Brick: I would like to state a revised proposed stipulation which I understand will be acceptable to the Commission's Counsel, as follows:

It is hereby stipulated that if Harry C. Koch, vice president of Lone Star Cement Corporation, were to testify on his direct examination with respect to the topics hereinafter indicated, he would give as his testimony with respect to those topics the statements hereinafter set forth.

33145 With Respect to the Classification of Business Sold Direct or Sold Through Dealers.

The Lone Star Cement Corporation had classified business so as to indicate what business would be sold direct, and what sold through dealers long prior to the Code period. In 1928, when the pamphlet "Trade Ethics and Marketing Policies" was published by the International Cement Corporation and its subsidiaries, it was stated in that pamphlet that Lone Star cement would be marketed in each community only to or through the recognized and established building material dealers regularly serving such community, with certain exceptions specifically set forth in the pamphlet. The pamphlet itself was withdrawn in June, 1930, but for the most part, the policy with respect to sales through dealers and direct sales announced in the pamphlet, remained unchanged, with some minor variations. For example, the classification of direct sales in Texas did not conform with the policy of the other subsidiaries in other sections. Particularly, sales were made through dealers to concrete product manufacturers in Texas at a time when sales were made direct in other parts of the country.

The Lone Star Cement Corporation has always preferred to sell through dealers wherever possible,

33146 and has sold direct to other purchasers only where forced to do so because of similar sales by competitors. Article XI of the N. R. A. Code made no substantial change in the marketing policy of Lone Star Cement Corporation, with the exception of the State of Texas, and there only slightly. After Article XI was suspended, Lone Star Cement Corporation continued to sell on substantially the same basis as before.

In February, 1935, a new statement of policy on this

subject was issued which was revised later in April, 1935. This statement of policy did not apply to the State of Texas. An announcement of policy for the State of Texas was issued in July 1935. There was also a later announcement of policy with respect to the State of Florida, the announcement for Florida being dated December, 1937. None of these announcements was the result of any meeting with dealers or dealer organizations, or the result of any meeting with competitors on this subject, or the result of any agreement or understanding with competitors on this subject. Since those announcements, and up to the date of the commencement of this proceeding, there have been no changes in the marketing policy of Lone Star Cement Corporation and there has been no understanding or agreement with any competitor whatsoever with respect to the marketing policy of Lone Star Cement Corporation or its application.

Terms of Sale and Discounts Allowed to Customers.

33147 Before the witness became connected with Lone Star Cement Corporation and during the period from 1905 to 1907 when he was engaged in the cement business, the practice was to allow a cash discount of 2 percent on cement only. From 1907 until 1914, the cash discount was at the rate of 2 cents a barrel. About 1914, the cash discount became 5 cents a barrel, which continued to be the practice until about 1920, when it went up to 10 cents a barrel. The time within which payment had to be made to entitle the purchaser to the cash discount was ten days from the date of invoice.

Prior to 1926, the Lone Star Cement Corporation had only a 10-cent cash discount per barrel. In 1926 it adopted a 10-cent trade discount to the dealer in addition to the cash discount. The period for cash payment was also extended to fifteen days from the date of invoice. The reason for changing the policy in 1926 in this respect was that there had always been considerable agitation by dealers for a trade discount similar to that allowed them on other building material supplies which they were carrying. With respect to other building materials, it was a common practice at that time to quote a price to the dealers and give them a trade discount on those materials.

Lone Sar Cement Company Texas was the first company

to institute the 10-cent trade discount in Texas. Its competitor, the Trinity Company, did not follow it.

33148 When the pamphlet, "Trade Ethics and Marketing Policies," was published in 1928, it referred to the 10-cent trade discount as well as the cash discount. The trade discount was discontinued in the fall of 1929. At that time it appeared that the dealers were not retaining the discount, but were making the practice of allowing the discount to some or all of their customers.

When Lone Star Cement Corporation discontinued the trade discount, other manufacturers did not follow it in making the change. The dealers demanded that the trade discount be restored, and as a result, in order to satisfy the dealers, the trade discount was restored about a month after if was abolished.

No attempt has been made to control the resale price of the dealers by use of the discount price or otherwise. The dealer has always been free to sell at any price he wishes to establish. On the other hand, Lone Star Cement Corporation did desire the dealers to retain the 10-cent differential between their price and the retail price because that was the purpose of the trade discount. After the trade discount was restored the dealers did not always retain this discount, however.

The Government has always received the trade discount just the same as in the case of a dealer, as did all other direct purchasers.

33149 In 1930, when the Lehigh Company announced its new marketing plan, Lone Star learned of this plan soon after it was issued, through information from salesmen in the field and dealers. The plan was accompanied by a decrease in price, and accordingly, Lone Star Cement Corporation advised its organization to meet this decrease in price as well as to get in touch with the dealer trade and report their reaction toward the Lehigh plan. As a result, through reports received from salesmen as well as letters from dealers themselves, it learned that the dealers did not react favorably to the Lehigh plan. Accordingly, it was decided not to adopt the plan. We were satisfied that the Lehigh plan would not work and that our plan was more satisfactory. Quite a number of companies did adopt the Lehigh plan. The Lehigh plan was in effect for some three or four months. Afterwards it was discontinued. Lone

Star learned of its discontinuance through advice of its salesmen in the field.

In the spring of 1931 Lone Star again discontinued the trade discount to dealers. In this case, it was not the first company to discontinue the trade discount. Neither the allowance of the trade discount nor the discontinuance of it was at any time the result of or the subject of any agreement or understanding with any competitor. Lone Star did not advise any competitors in advance of any decision on its part to make any change with respect to trade
33150 discount or cash discount, nor did it know in advance of any change planned by competitors.

Areas in Which the Price is the Same at all Points.

In certain metropolitan areas, Lone Star Cement Corporation has what is generally called a blanket price. It usually corresponds to but sometimes extends beyond the switching zone in the city. Lone Star Cement Corporation has initiated such blanket price at certain points such as Dallas, Houston, Texas; New Orleans, Louisiana; and Norfolk, Virginia. It has found blanket prices by competitors in effect at Birmingham, Alabama; New York City, Long Island and West Chester County, and Boston, Mass.; also at Chicago, St. Louis and Kansas City.

The reason for such a blanket price is that the area where it is found may be said to be common selling territory for every dealer in it, in that the dealers, although they have warehouses at different points in the area, are all selling throughout that area in competition with each other. The blanket price serves to give them the same price in order to permit them to compete on equal terms with the other dealers selling Lone Star's brand and competitors' brands in that area.

In no case has the Lone Star Cement Corporation established any of these blanket prices or adopted any of them as the result of any agreement or understanding with any of its competitors.

33151 Five-Day Notice of Price Advances.

Lone Star Cement Corporation has used the five-day notice of an advance in price ever since the witness has been connected with it. Prior to that time, when he was in the cement business in Kansas, the practice was general, extending back as far as 1913 or 1914.

The reason for the five-day notice of advance in price is to prevent salesmen from what was called "tipping the

market," that is to say, from obtaining orders from customers on representations which, in many cases, might be false, that the market was going to advance. In order to avoid having its dealers induced by salesmen of competitors to place orders on the theory that the market was likely to advance, Lone Star Cement Corporation assures the dealer of a five-day period during which he can place orders on the old basis for shipment within fifteen days from the effective date of the price advance, or over any period covered by specific contract.

The witness first observed the use of a five-day announcement of advance in price when it was inaugurated by the Dewey Portland Cement Company in Kansas, around 1913 or 1914. The company that the witness was then connected with followed the example of the Dewey Company in order to give its dealers the same protection as was afforded dealers of the Dewey Company. When the witness went to California he introduced the same practice
at the time when he was connected with the Old Mis-
33152 sion Cement Company, and later brought the practice to Texas. He was also the one who started the five-day notice of price advance in the East on the part of Lone Star Cement Corporation. Gradually other competitors followed the same practice.

This practice was not adopted by Lone Star as the result of any agreement or understanding with its competitors nor has it been continued on the basis of any agreement or understanding.

Five-Day Retroactive Protection Against Price Decline.

This practice grew out of the N.R.A. Code. Prior to the Code, the company policy was, as stated in its pamphlet, "Trade Ethics and Marketing Policies," as follows:

"In event of decline in price, quotations will be made effective on date of issue and reduction authorized to apply on all shipments in transit and that have not yet reached destination and been unloaded in customer's warehouse."

After the N.R.A. Code, the practice of the five-day retroactive price was continued because it was found to be a good practice, satisfactory to the trade and one which eliminated friction and argument with dealers.

This policy has not been the result of or the subject of any agreement or understanding on the part of Lone Star Cement Corporation with its competitors.

33153 The Lone Star Pamphlet—"Trade Ethics and Marketing Policies."
(Comm. Ex. 1112)

The witness collaborated with other executives of the company in the preparation of this pamphlet. Parts of the pamphlet had been issued separately during the years before the pamphlet itself was compiled. It was issued in or about the year 1928. At the time when the pamphlet was compiled in 1928, the witness worked on the editing and compilation of the pamphlet.

The primary purpose of the publication of the pamphlet was to give to trade and the public a clear statement of the policy of the International Cement Corporation and its subsidiaries so that the trade would know what to expect from them. It was also intended to serve as a manual for the sales force. The company had been expanding quite rapidly and in the course of such expansion took over the sales forces of other acquired plants and also added many new men. This pamphlet offered an easy method of schooling them in the policies and methods of the International Cement Corporation. It did not change any policies then in force to any extent. It was an attempt to re-state policies that were already in force. It was not compiled or published as the result of any agreement or understanding with any competitors, nor was it intended
in any way to facilitate any agreement or under-
33154 standing or to accomplish any concerted action on the part of International Cement Corporation and its competitors.

33155 *Cross-Examination by Mr. Wooden.*

Q. Mr. Koch, with reference to your subscription to the Institute freight service, did you give us all the reasons in your testimony as to why you subscribed for it?

A. All the reasons that occurred to me.

Q. Do you mean to say that the value of the service as a means of figuring delivered prices, and of having those delivered prices the same as your competitors, who used the same service, did not figure in your decision to subscribe?

The Witness: Let me have that again.

(Last question read by Reporter.)

A. I was not concerned in the same price as my com-

petitors. I was concerned in the easy economical way of figuring rates from our mills as well as from our competitors' mills.

By Mr. Wooden:

Q. Calling your attention to Commission's Exhibit 2461, which is a letter from Mr. Hogan, of your company, to Mr. Pierson, of your company, in 1931 regarding the Institute freight service, and in which your name is mentioned as having written on the subject, do you wish to take issue with Mr. Hogan's statement that this freight service of the Institute gave the freight rate information to
33156 practically all the companies in a given territory and thereby serves to prevent variations in quotations by the various companies which might be due entirely to incorrect freight rate information?

A. It is Mr. Hogan's letter. I can't vouch for it.

Q. Well, do you mean to say that your reasons were different from Mr. Hogan's?

A. That might be.

Q. Do you mean to say that Mr. Hogan did not state correctly the facts when he wrote that?

A. I don't think he stated the policy of the company as I understand it.

Q. What was your relation to Mr. Hogan in 1931?

A. Mr. Hogan was one of our vice-presidents.

Q. And what were you then?

A. A vice-president.

Q. Mr. Hogan is now president?

A. Correct.

Q. And were you and Mr. Hogan of the same rank as vice-presidents?

A. We had different duties. Mr. Hogan had nothing to do with sales. He looked after checking of costs, or something, for the president.

Q. Mr. Hogan was the executive vice-president, wasn't he?

A. I imagine you could call him that.

33157 Q. And in charge of determining the company's policy?

A. Oh, no.

Q. More so than you were, wasn't he?

A. I wouldn't say that. We collaborated on things. But the man that made the policy, after all, was the president when we put our propositions up to him.

Q. I call your attention to Commission's Exhibit 2462. Does that refresh your recollection that your vice-president out at Indianapolis wanted to discontinue the service because of the economy, in order to save money?

A. Well, Mr. Pierson felt that he would not save money, but my recollection—

Q. Would not save money by doing what?

Mr. Brick: Please don't—

A. By subscribing for these books, according to this letter. But the facts as later shown are clear that he did save money.

By Mr. Wooden:

Q. You do not think Mr. Pierson's judgment as to whether it would save him any money, or his branch of the business any money, was worth considering?

A. Oh, a vice-president's judgment is always worth considering, Mr. Wooden. But Mr. Pierson is not a rate man; had no traffic knowledge.

Q. You say that you were not interested in using 33158 the freight rate service of the Institute for the purpose of having your delivered prices the same as those of your competitors?

A. I wanted to know what it cost to get it there, and what it cost the other fellow to get it there, Mr. Wooden.

Q. Well, you wanted to know the cost of getting it there from other people's mills, didn't you?

A. That is right. I so stated.

Q. Didn't you want to know that in order that you might equalize your delivered prices with the delivered prices of your competitors?

A. Well, I could equalize that without having a rate.

Q. My question is, didn't you want to have the rate information for that purpose?

Mr. Brick: For what purpose, Mr. Wooden?

Mr. Wooden: In order to enable him to equalize his delivered prices with those of his competitors.

A. It might have that effect, but that was not the purpose.

By Mr. Wooden:

Q. In other words, there is an effect that you did not have in mind even; is that what you mean to say?

A. Yes.

Q. Isn't it necessary that all competitors figure the

freight in the same way, in exactly the same way, in order to have an identical delivered price at any destination?

A. I would say in order to have an identical price
33159 you would have to do something like that, or meet a price, regardless of rates.

Q. It is your idea, as I understand it, that meeting, or making your delivered prices the same as those of your competitors is meeting competition; is that right?

33160 A. That is one form of competition, most assuredly.

By Mr. Wooden:

Q. Is it your conception of competition that unless your delivered prices are the same as those of your competitors you are not meeting competition?

A. If my price at destination is not the same as my competitors, I am not meeting competition. If my price was lower, I would get the business. If my price was higher, I would not.

By Mr. Wooden:

Q. In other words, you think that in order to have competition, your delivered prices have got to be the same as your competitors'; is that right?

A. No. No. That is one form of competition.

Q. You can have competition with the same delivered prices, and you can have it with different; is that right?

A. Yes.

Q. Isn't your conception of price competition that of matching the delivered prices of your competitors?

A. I think I used that word "matching" in the Texas case, but that would not—that is one form.

Q. Well, you did testify in the Texas case, then, didn't you, that you construed the word "competition" as
33161 matching prices?

A. In other words, what I meant by that, Mr. Wooden, was that is one form of competition.

Q. Well, I would like to get an answer to the question before you explain it.

A. Well, the record speaks for itself.

Q. Did you testify in the Texas case—

A. I did.

Q. —in answer to this question:

"Q. What is your definition of competition on a price basis?"

And your answer:

"A. I always construed the word 'competition' as matching prices, or in placing yourself in a position to solicit an order on a standardized product on an equality with the other man."

A. Well, I—

Mr. Brick: (Interposing.) I object to the question, if Your Honor please, on the ground that it is incompetent, irrelevant, and immaterial, and covering a subject which was not treated on the direct examination.

Trial Examiner Norwood: The objection is overruled. Answer whether or not you made that answer—whether you had that question propounded to you and whether or not you made the answer that Counsel read.

33162 A. I—as I recall, that is an answer I made. If I put any qualifications on it, I don't recall them at the moment, Your Honor.

Mr. Wooden: I might say that I was referring to Commission's Exhibit 2956-T, for identification, and if the witness cares to look at the Texas record that contains that testimony on page 1827, why, he is welcome to do so.

The Witness: Your Honor, I don't think this is an official copy (referring to record handed him by Mr. Wooden).

By Mr. Wooden:

Q. You can add any other portions of it that you care to, to explain your testimony here, if you have explained it there.

A. (Referring to record.) I can't tell whether this is the corrected copy that I signed. I am inclined to think it is not. There were certain changes made, but I don't recall just what they were.

Q. Well, I show you Commission's Exhibit 2956-T, for identification, which it was testified was part of the corrected copy that you corrected, and if you want to—

A. I read that, Mr. Wooden—

Q. Yes.

A. —and Mr. Bricker, the stenographer, did not state the facts, nor the truth. I had not signed the doc-
33163 ument, and did not for three months after he gave testimony.

Q. You had reviewed it, and corrected it?

A. I had told him that I had reviewed and corrected it.

Q. Do you now wish to modify the testimony that you

gave in the Texas case, to which I have called your attention?

A. I would improve it to the testimony that I have given in this.

Q. As you have already given?

(Witness makes no further response.)

Q. Now, with reference to the freight rate book, again—

A. Yes.

Q. —freight service, is it of any importance to your company as a shipper of cement from any standpoint, or for any reason, to know the routing of his shipments?

A. Not material.

Q. It is a matter of indifference to you what the routing information is?

A. Very, very little in there, unless you are trying to favor some particular line for reciprocal reasons. Of course, there is the question of service, but that is usually well known to those engaged in the business. It is only a practical matter.

Q. You get your routing information, do you not, from the railroad tariffs?

A. If you wanted to insert all routing, you would necessarily go to it; if you wanted to check whether it ap-
33164 plied by a certain route, you probably would, unless you took the easier method and called up the railroad.

Q. You keep a set of railroad tariffs on file, do you not, from which you can—

A. We keep some on file. I wouldn't say that since we subscribed to this service that they are kept absolutely up to date; that is the intent, but with the ease of the use of the Institute book, why, some of the other work that we did naturally slides, or has been reduced.

Q. You said you made a study of the relative costs of freight rate service that you were carrying on on your own behalf in 1929, and the possible costs for the Institute service; is that right?

A. Yes.

Q. You made that study, as I understand it, in 1929?

A. I made a survey and study without tabulating it, yes, Mr. Wooden.

Q. And you made another in December, 1939?

A. I did.

Q. Did you make any in between those times?

A. Oh, you make tests.

Q. Well, did you?

A. Well, I—

Q. Did you?

A. I say I made tests, I say perhaps I made a
33165 study in 1929, I know what it cost along 1926 and 1927, it kept reducing, reducing, reducing, until I had made my last study for 1939.

Q. Was your 1929 and 1939—were your studies in those two years,—were they rather complete surveys?

A. Well, for all practical purposes, because the rate service is charged to my department, it is part of my costs of sales.

Q. Were they more complete than the intermediate checks or tests that you made?

A. I wouldn't say so.

Q. What was the cost per year to the Lone Star Company, or the International Company, whichever it was in 1929, of compiling its own freight rate books?

A. Would you care if I gave it to you about 1926, and then give you 1929?

Q. All right.

A. To the best of my recollection, the compilation of the freight rate books and the traffic costs incidental thereto, over the ten properties, or plants, which we own, and the 15 sales offices that are maintained, and more than a hundred field salesmen, the cost, as I recall, was approximately $53,000 per year.

Q. How much of that was due to the compilation of your own freight rate books?

A. Well, that's hard to separate, Mr. Wooden, from a traffic manager. If you are checking your own rates,
33166 it requires a higher priced, more skilled, and more experienced man to compile those rates, for your stenographic help, or for checking back against your original draft of figures.

Q. Well, whatever difficulty there was, you surmounted it, didn't you, to make that study in 1929?

A. Oh, yes, we would—

Q. I am asking you what the cost of it was, of compiling your freight rate service for yourself in 1929?

A. I can't tell you how much it cost to compile the book by itself.

Q. Well, compiling, though, the freight rate books which you used during that year.

A. I can't tell you that. I can tell you what it cost me for my traffic service.

Q. Well, what did that cost?

A. That cost me about $53,000.

Q. Did you include in that all your sales offices?

A. Ten of them that had traffic managers in them, yes.

Q. Did you include in it the expenses of the office?

A. No, sir; just their salaries.

Q. Including salesmen, and—

A. No, sir; no salesmen; just the salary of those engaged in the traffic department, not even their traveling expenses.

Q. What was the expense of your traffic department in 1939?

A. My recollection is about $16,000.

33167 Q. Did you put down the figures in a memorandum, or a tabulation, when you were considering the subscription to the Institute freight books?

A. I don't recall, there might have been pencil figures, you do that frequently.

Q. Well, didn't you refer to some studies, or such a survey, before you came here to testify?

A. Well, I couldn't if I didn't have any record of them. All I could refer to was the pay rolls at that time. They are a matter of permanent record.

Q. You don't know what part of the pay roll of your traffic department was used for compiling these rate books, do you?

A. No, I do not.

Q. You didn't know it in 1929, did you?

A. No, all I knew was what the traffic department—what I had to maintain to get out my rates that way, and look after my traffic matters.

Q. You charged the traffic department's entire expenses against compilation of the rate books; is that right?

A. No, sir.

Q. How?

A. I charged it against my traffic expenses, and I am comparing it with my traffic expenses today plus the cost of my rate books.

Q. You say all the difference between your
33168 $53,000 traffic expense in 1929, and your $16,000 traffic expense in 1939, is due to the fact that you subscribe to the Institute freight book service?

A. I would attribute practically all of it to that, because I can replace a high cost traffic man with a cheaper one.

Q. How many high-priced traffic men did you replace in that year?

A. Do you want me to enumerate them?

Q. Yes.

A. By names, or otherwise?

Q. Names and differences in salaries.

A. All right.

In the New York office we had a Mr. T. C. Taylor—make that F. C. Taylor—it may be confusing here, there were two Taylors, no kin, and their initials are almost the same—who received a compensation of $7,200 a year.

There was a Mr. T. C. Taylor,—it might help you there if you you made the first one Frank and the last one Tom—who received a compensation of—I wouldn't be definite—four hundred or four hundred and fifty dollars a month; that would equal—well, make it $5,000 a year.

There was an assistant clerk who transcribed and checked with him, that cost us, say, $3,000 a year.

There was a stenograper at—I think the New York rate at that time was about $125 a month; say $1,500 a year.

33169 There was a sub-traffic man at the Albany office—

Q. Have you finished the New York City office?

A. New York City office—but I have got in my work, Mr. Wooden,—I have got to take my New York City office, and my Pennsylvania division, and my New York division together, they are so interwoven, and so short a communication, that you station one man out here and one man out here; but the major work is done in the New York City office.

Q. I want you to compare the before and after.

A. My comparisons will be on the same basis, I assure you.

At the Albany office we had a man for the direct work with the Hudson plant at, say, $2,400 a year.

At the Philadelphia office, for our Nazareth, Pa., plant, we had a man at, say, $3,000 a year.

At the plant we took half of the chief clerk's time for the billing, the securing of cars, and other features, so we were charged with half of that time in traffic, so I will place him at $1,800 a year.

I don't know how that will total. As I recall it, my totals should be up, for those offices, around $15,000.

Q. That was when, in 1929?

A. That was 1926. I had been able over the whole membership, of 1929, by my own efforts, before going to the Institute, to reduce that—through these Institute books—to reduce that, as I recall, about—the $53,-
33170 000—about $5,000, over the whole membership.

Q. You mean reduce it from $53,000 by $5,000?

A. Yes.

Q. In other words, forty-eight?

A. That's right; that's right.

Q. Yes. You did that before you subscribed to the Institute?

A. Yes, yes.

Q. All right.

Now, take those same offices and compare them with 1939.

A. All right, 1939, we had Mr. Mahon. Mr. Mahon was getting fifty—I might be wrong in some of these figures, but they are approximate; they can be checked if you desire them—I would say $5,400 a year. His assistant was getting, that clerk was getting, say, $2,700 a year, —he is an assistant, and does certain work, you might say, a budding traffic manager.

Say, half of the stenographer's time at $150 a month, would be $900 per year.

We will take the Albany office for the comparative purpose. I think the young gentleman up there cost us, oh, about $190 a month,—let us call it $2,400, for comparison.

The man—there is no Philadelphia office, and the sales office that was the Philadelphia office now operates out of New York City and has no traffic department, so that we take the one man at Nazareth at the plant at, say, $2,200.

33171 If you will total that, you can see the saving, or the difference. I can't total it mentally, without putting it down, Mr. Wooden.

Trial Examiner Norwood: That is approximately what it was?

The Witness: Yes, yes, you can check it yourself.

By Mr. Wooden:

Q. Have you compared all of those offices?

A. I took those three.

Q. In 1929 as against 1939; is that it?
A. Yes.
Q. Is that what you did?
A. Yes, that is what I was doing.
Q. Is it your—
A. Do you want me to go on and compare some others?
Q. Well, we may come back to it later.

Is it your testimony that your traffic department has no use for railroad tariffs, but bases their work entirely upon the Institute freight rate books?

A. Mr. Wooden, I am not going to say that they have no need of the tariff, but bear this in mind, please, let us be practical, we only make one commodity, namely, cement. We receive at some of our plants, a few of them—let us see, one—two—I think six of them we received coal—we received some gypsum at the plant; we always received returned bags.

33172 Q. Well, I am talking only about the shipment of cement.

Is it your testimony that your traffic department depend entirely on the freight rate books of the Institute rather than the railroad tariffs?

A. Well, they were supposed under our policy to check with the tariffs. I find that they do not; that they use the book; they may make a few test checks.

Q. Is it your testimony that your traffic department uses the freight rate books of the Institute on the made-out bills of lading?

A. The Institute book has nothing to do with the bill of lading.

Q. Well, where does the freight rate go on the bill of lading? Where does it come from?

A. It comes either from—well, you might say, as it stands now, since we quit taking our own rates and putting it into a master price book, as you trace it back, the source came from the Institute rate book. There may be several operations in there, but I am just mentioning that to bring it down to where it originates.

Q. And without checking against the official tariffs?

A. Yes. I would say most of the rates were not checked against them. Some are.

Q. You are willing to accept any possible errors in the Institute book as against the official tariffs?

33173 A. Well, we are not willing to accept the errors, and I think there are very few ever get in there.

They usually come out in the wash. It is a collective operation.

I might add we might even have our own rate and a tariff.

Q. Do you say that you would increase your costs in these three offices you talked about for shipping purposes if you were to continue the subscription to the Institute freight service?

A. Let me see if I understand you correctly. In other words, if I cannot use or secure at the price that I have been securing the Institute rate books, it would increase my traffic cost of operation, than compiling my own books?

Q. No.

A. Perhaps I did not understand the question. Pardon me.

Q. I am talking about compiling your rates from your shipping points for shipping purposes.

A. For shipping purposes?

Q. Yes.

Mr. Brick: If your Honor please—

A. I might not have to compile any at all, unless I am going to sell on a destination price. What would be the object in my checking the rate?

Q. You merely mean, then, that as your old company compiled freight rate books they showed the freight
33174 rates not only from your shipping points but from the shipping points of competitors, but you could not do that as cheaply by yourself as through the Institute; is that it?

A. Oh, absolutely not. I said in my previous testimony to you on direct as to how I find they were selling cement in the Southeast. I probably need no traffic department at all. All I need is a stenographer-shipping clerk. When I am going to sell it at the mill what difference does it make?

Q. Well, even if you sell delivered, and sell only by reason of your own shipping points, all you need is the freight from your own shipping points; isn't it?

A. That is quite true. But how could I sell delivered if somebody else came in there and I had no flexible way of meeting the competition at the point of use?

Q. And meeting the competition at the point of use, you said a while ago, was matching the delivered price of your competitors?

A. That is one. One method.

Q. Yes. And is the method that this common freight rate service provides, isn't it?

A. Any freight rate service, be it from the tariffs or otherwise, can be used for that. You could go to work and take the freight rates like a dollar bill and run horses with it, or anything else.

Q. As a matter of fact, for traffic purposes out of
33175 your own mill plants all you need to know is the freight rates from your shipping points, isn't it?

A. If I am selling it at mill I don't even need to know that.

Q. Even though—regardless of whether you are selling at the mill, merely for shipping purposes, all you need to know is the shipping rate from your own shipping points, isn't it?

A. I still insist I don't even need to know that, unless I am selling at the delivered price.

Q. You don't need to know more than that?

A. I don't need to know that. I said, Mr. Wooden, and I sincerely believe, from my experience, that I can walk down to the railroad at Norfolk to anyone and say—car so and so—"I would like to get it down to Greensboro. Go ahead and move it."

Q. Well, for shipping purposes you don't need to know any more than the shipping rates from your own shipping points, do you?

A. Well, will you please explain what you mean by that? For shipping purposes you don't need a rate. I say when I tell him to move the car he will ship it.

Q. You still, though, may need the rate for some purpose?

A. To figure my destination price.

Q. Oh.

A. I do not deny it. That is in our pamphlet.
33176 Q. And for shipping purposes?

A. We use the same thing.

Q. You don't need it for anything other than your shipping points, and not for pricing purposes, do you?

A. Now, let us see if we understand each other.

If I am selling at a destination price I must have rates. If I am just shipping without regard to what it costs the buyer I need no rate.

Q. And you don't need any rates in any event except those from your own shipping points; is that right?

A. Well, why do I need those? Unless I sell at delivered prices, you don't need a rate.

Q. You don't need rates from other mills unless you are selling at delivered price; is that right?

A. I don't need them from other mills, and I don't need them for my mill.

Q. You don't need shipping rates from your mill if you sold at a delivered price from your mill?

A. Oh, yes. Oh, yes. Now, then, you are agreeing with me. We are coming to an understanding that we are selling at a delivered price.

Q. Can't you have a delivered price selling only from your own shipping points?

A. I would have to close down my mill. I am trying to run a business and keep the business.

Washington, D. C.,
Tuesday, February 27, 1940.

33179 HARRY C. KOCH thereupon resumed the stand and testified further as follows:

Cross-Examination (Continued) by Mr. Wooden.

Q. Mr. Koch, in your direct testimony on pages 33119 and 33172, you referred to your company's use of a master price book.

A. That's right.

Q. Will you describe that book to us.

A. For better than 30 years, Mr. Wooden, wherever I had been connected, we had a book, which was ruled, generally, in blank; that carries all sources of cement production at the top of the column, and then all the in-
33180 formation pertaining to the rates on cement per hundred pounds, in squares, below that. To the right of that it carries the price we determine for that destination, the town and the railroad location being given to the right of that.

The left page of that, which is really the back page—or the back side of the other pages—carries information regarding our incor, and the dealers located in the town.

Q. Do you have a separate sheet for each destination?

A. No, no. I think that each sheet will carry—well, this is approximate—ten to twelve towns.

Q. Are the freight rates shown in that master price book—

A. Yes.

Q. —taken from the Institute freight rate book?

A. Of recent years, yes—either that or the tariff.

Q. Does the master price book show the points on which the delivered prices are based?

A. No.

33184 Q. Doesn't your master price book, Mr. Koch, show the points across the top on which the delivered prices shown on the sheet are calculated?

A. "Yes" and "No." It covers more points—

Q. All right.

A. —that we use for calculating delivered prices.

Q. It includes the points, then—

A. That's right.

Q. —that you use to calculate the delivered prices?

33186 A. Yes.

Mr. Wooden: I think that he answered the question before I got through, but your answer is the same after I got through, of course?

The Witness: Yes.

By Mr. Wooden:

Q. Why do you have in the master price book some shipping points that you do not use to calculate delivered prices?

A. Well, I can never tell when I will need them.

Q. In other words, they may become points that you would use in calculating delivered prices; is that what you mean?

A. In other words, they might become basing points over night.

Q. Now, Mr. Koch, with reference to the matter of routing shipments, I am referring you to Commission's Exhibit 200 (showing document to witness), which relates to the matter of routing shipments, and provides that the seller or shipper reserves the right to select and control the routing.

What is the purpose of retaining control by the seller or shipper of the routing?

33187 A. We have always carried that in our contract forms, and I think our sales forms. We might deem it expedient to use a certain carrier, rather than the one designated by the buyer: if we found that the service had

been poor, that we couldn't get claims adjusted, and that there was some other factor,—might be some other factor,—that didn't seem to be to our best interests.

Q. What is the reason underlying The Cement Institute's interest in the subject of controlling of the routing of shipments?

A. That I do not know.

Q. Do I understand from your direct testimony that there are some instances where the railroad may charge a higher rate because the route is not specified?

A. There is none occurring to me at the moment; there may be.

Q. Would you say there were some rare instances?

A. I would say there were perhaps some rare instances.

Q. Can you tell me why it is of any interest or importance to The Cement Institute to control the routing of shipments in the hands of the seller, in view of your testimony on direct that it was not important, and it was immaterial from the standpoint of the shipper what the routing might be?

A. Mr. Wooden, I have no idea why the Institute issued that circular; it is Greek to me.

Q. You don't think it has anything to do with 33188 the matter of diversions, or anything of that kind?

A. I don't know.

Q. Is it not a fact that your company adopted the forms of contracts recommended by the Code Authority under the N. R. A. Code?

A. I don't recall, but I do not think we changed our form.

Q. Do you mean to say that the Code Authority recommended the form that you were already using?

A. I could not say as to that. It might be true, and it might not be true.

Q. And, now, do you recall that the Compendium of The Cement Institute also recommended certain forms of contract to be used?

A. I paid little attention to the Compendium. It crossed my desk, and that was all.

Trial Examiner Norwood: Well, do you recall it, or do you not recall it?

The Witness: I recall that there was such a document. What it stated, I cannot say.

33190 Q. Do you say, Mr. Koch, that the N. R. A. Code was not an agreement or understanding among the members of the industry?

33191 A. The N. R. A. Code, as I recall it, was issued—

Q. Can you not answer my question and then explain?

A. Well, now, let me see—

Trial Examiner Norwood: I think he is beginning to do it.

Mr. Wooden: All right.

The Witness: Can I answer in my own way?

Trial Examiner Norwood: Go ahead.

A. (Continuing.) —was compiled in collaboration, so far as I know—I had nothing to do with it—with the Government officials.

Trial Examiner Norwood: I think it is much better if you will answer the question first.

The Witness: Well, now—

Trial Examiner Norwood: And allow Counsel on the other side to bring out any explanations. We will get along much faster if you will do that.

Now, read the question.

(Question read by Reporter.)

Trial Examiner Norwood: Now, give us your reaction to that.

Mr. Brick: I do not think his reaction can be any more direct than he has stated it. He stated he did not know anything about it.

Trial Examiner Norwood: Go ahead and answer
33192 the question.

A. It was what was presented to the N. R. A. authorities, and accepted, but I do not recall that a contract form was a part of the Code. My recollection is that it was put in after the Code or made a part of the publication, as the suggested practice, or good practice—whatever you might want to term it.

By Mr. Wooden:

Q. Do you say that the N. R. A. Code that was formulated did not embody an agreement or understanding regarding any of its contracts?

A. Well, I would say that it was what the industry found that they could get the N. R. A. people to accept.

Q. Were you not aware that the industry conferred

and voted on the various provisions of the Code before it was submitted?

A. I don't know that.

Q. Was not Mr. Hogan or Mr. Neylan active in the affairs of the Institute at that time?

A. Mr. Neylan never had anything to do with the Insttiute. Mr. Neylan was a member of the Code Authority.

Q. Was he a director of the Institute also?

A. No, sir.

Q. Was Mr. Hogan, of your company, an officer of the Institute, or a director?

A. I am not sure about that. He was at times,
33193 and other times perhaps not.

Q. Do you remember that Mr. Neylan was a member of the Trade Practice Committee that succeeded the Code Authority?

A. That was a continuation of the Code Authority, as I recall it.

Q. It is your testimony that you never had any discussions or conversations with competitors about any of the competitive conditions or trade practices in the industry?

A. So far as I can recall, unless I happened to "sub" on the Code Authority for Mr. Hogan; I do not think I "subbed" for Neylan—

Q. I am not confining it now to the Code period, but is it your testimony that you never consulted with or conferred or discussed the trade conditions or trade practices with any of your competitors?

A. I don't recall any.

Q. Do you make that statement, regadless of the period of time to which it might relate?

A. Oh, my goodness; that is a long period. A man probably said to me, "If you sell this way, you have to be a traffic man." "Well," I said, "you should know something about it."

Q. Would you deny that you have ever discussed the trade and competitive conditions with any competitor?

A. Someone may have asked me what I thought of this or that. I have always been free with my answers.

33194 Trial Examiner Norwood: Read that question.

(Question read.)

Trial Examiner Norwood: Please give a direct answer to that.

Mr. Brick: The witness, in his answer, was sufficiently direct.

Trial Examiner Norwood: Off the record.

(There was a discussion off the record.)

(No discussion.)

A. I have no recollection of such.

Mr. Brick: Let the record show that the Examiner would not permit Counsel for the Respondents to make an objection to the question which the Examiner put to the witness.

Mr. Wooden: That the Examiner put to the witness?

Mr. Brick: Yes, sir.

Mr. Wooden: Well, I will repeat my question.

By Mr. Wooden:

Q. Do you wish to deny it, Mr. Koch; or do you just insist on saying that you don't remember?

A. I don't remember, Mr. Wooden; I can't say exactly.

Q. You are not willing to deny it?

A. Well, I don't know what you would call discussing trade conditions.

Q. I am letting you be the judge of that.

A. I tried to repeat on several instances, and 33195 you said that was speculation. I can't go any further.

Q. If you gave it as an actual occurrence, I have no objection; but you were just talking about what might happen.

A. Well, I recall that as an actual occurrence.

Q. Well, go ahead and describe it, then.

A. Well, my recollection is that it happened about 1908 at Savannah, Ga. The Edison representative that was receiving cement in boat lots happened to meet me on the street, and said, "You are selling f. o. b. destination?" "Yes." "Well, the man to do that would have to be a traffic man." I said, "Well, he should know something about it."

Q. Is that all the instances that you can recall of any discussions with competitors in your whole career?

A. Well, I talked, of course, with people in our own employ that have taken employment with competing companies, since.

Q. You mean you discussed trade matters with them after they became associated with competitors?

A. No.

Q. You mean after they came to you from competitors; is that it?

A. Oh, no, no, no, after they were—

Q. Explain yourself.

A. When they were trained in our employ, after they left our service, why, they were competitors.

Q. And you continued to have contacts with
33196 them and discuss competitive questions?

A. No, not that I recall.

Q. With reference to this matter of your company getting reduced rates from railroads to meet foreign competition, did your company join with other cement companies to get those rates from the railroads?

A. Yes.

Q. What other companies did you join with on that?

A. I would say Texas—perhaps it was the Trinity Company, I wouldn't be definite about that. In the East, I imagine every company that had a traffic department.

Q. Name some of them.

A. Well, that would take Lehigh, Alpha, Penn-Dixie—

Q. Universal-Atlas?

A. I am not sure about Universal-Atlas. My recollection is they never were active in asking reduced rates from railroads.

Q. When you say that you have never had any agreement or understanding with competitors regarding trade practices or prices, I understand you to include prices in your statement?

A. You didn't ask me about prices.

Q. Well—

A. No, not on prices or trade practices.

Q. You included that in the same answer?

A. Yes, yes.

Q. When you make that statement, do you take
33197 into account the settlement that your company made with the State of Texas on the subject there?

A. Yes.

Q. Isn't it a fact that you joined in settling that suit with several competitors in Texas?

Mr. Brick: Just a moment—

Q. —including a payment for all of those competitors, and yourself, of $400,000 to settle the suit?

33201 Q. As a vice-president of the Lone Star Company, you were familiar, were you not, Mr. Koch, with the terms of the settlement made in the Texas case?

A. I had nothing whatsoever to do with the negotiations for the settlement of the case; anything I know has either been said to me by my president, or come to me by the runior around.

Q. Well, you are familiar with the terms of that settlement, are you not?

A. I am not.

Q. You learned it from your president?

A. The president, yes.

Q. Didn't you learn from your president that settlement was based on a total payment of $400,000?

33203 Mr. Brick: —another would be the alleged practices which were included, possibly, in the complaint. Now, Your Honor stated that you would permit the witness to be interrogated for the purpose of determining his concept of an agreement, and Mr. Wooden is directing his entire attention to the facts relating to the settlement with the authorities of the State of Texas.

Trial Examiner Norwood: No, no; just as to what the facts were, within the knowledge of the witness, when he testified that there were no agreements. I think Counsel for the Commission has a right to bring that out.

The objection is overruled.

Read the question.

(Last question read by Reporter.)

Mr. Brick: If Your Honor please, it is hearsay.

Trial Examiner Norwood: Well, I understand that. Can you restate that question?

By Mr. Wooden:

Q. I asked you to state, I believe, Mr. Koch, what you learned from your president as to the nature and terms of the settlement with the State of Texas.

Mr. Brick: I object to that, if Your Honor please.

33204 Trial Examiner Norwood: Objection overruled.

A. I learned that there was no plea made of guilty—underscore the "no." To stop expensive litigation, we paid $100,000.

By Mr. Wooden:

Q. Did you learn that that suit was brought under the antitrust laws of the State of Texas?

Mr. Brick: I object to the question. It is incompetent, irrelevant, and immaterial, and I object to it on the grounds heretofore stated, and, in addition to that, this entire line is hearsay. The witness has stated that he had no connec-

tion with the settlement. It has not even been shown that he knew what the case was about or what the allegations of the complaint were.

Trial Examiner Norwood: I think the question should be directed to his knowledge as to any agreements.

Mr. Brick: I would like to have an objection to the entire line, if I may.

Trial Examiner Norwood: Yes.

Mr. Wooden: It has a bearing on his testimony as to what constitutes an agreement in his direct testimony.

Trial Examiner Norwood: Yes. I overrule the objection.

Ask the question.

(Last question read by Reporter.)

33205 Mr. Brick: I object to it, if Your Honor please. It calls for a legal conclusion.

Trial Examiner Norwood: You objected; I overruled it; you have an exception.

Answer the question.

A. Well, it is brought under the laws of Texas. Whether it is anti-trust or otherwise I am not prepared to say.

By Mr. Wooden:

Q. Did you not learn that it involved alleged agreements and understandings among competitors in Texas to restrict price competition?

Mr. Brick: I object to that question. There has been no foundation laid.

Trial Examiner Norwood: Overruled.

Mr. Brick: There has been no foundation laid for it, and I object to it on all grounds heretofore stated.

Trial Examiner Norwood: Objection overruled.

Go ahead.

A. As best I can recall most everything. I could not single out individual things.

By Mr. Wooden:

Q. Did you not learn that it included what I put in my question just now?

Mr. Brick: I object to that question. It is entirely too indirect.

33206 Trial Examiner Norwood: Objection overruled.

Mr. Brick: Well, if Your Honor please, do not overrule me before I have had an opportunity to state the objection.

Trial Examiner Norwood: It is the same question that was asked before, and on which I have already ruled. Will Counsel please not interrupt until we get the answer.

Have you the question there?

The Witness: What was the question?

Trial Examiner Norwood: Read the question.

(Last question read by Reporter.)

The Witness: What was it he had in his question?

By Mr. Wooden:

Q. The alleged agreements to restrict price competition.

A. I think that was one of the charges.

Q. Did you reach an understanding with your competitors who were involved in that suit that you would pay $100,000 in settlement?

A. I don't know—

Mr. Brick: I object to that, if Your Honor please. Is Mr. Wooden being permitted to continue this line merely on the same ground, that he is now testing the witness' concept of an agreement?

33213 Q. You say that when you established new bases at your mills you reduced the number of competitors materially for a period of time. Was it a temporary reduction in the number of competitors?

A. Now, that is not what I said.

33214 Trial Examiner Norwood: Did you say that?

The Witness: That is not as I recall it. I said we reduced the number of competitors as time went on—I may have said over a period of time. By that I meant that they did not all desert the markets at once. It takes time to finally evolve these things to find out whether they are going to remain or whether they are going to withdraw.

By Mr. Wooden:

Q. Well, what I am trying to get at is whether a situation of a reduction in the number of competitors was a permanent situation, or whether, later on, the number of competitors increased again in the territory on your base mills?

A. There might be some slight fluctuations, but, generally speaking, it is permanent.

Q. You mentioned New Orleans, I believe, that you cut out all but two or three competitors there when you submitted the base.

A. It has taken up to the present time to get them to that. That is correct.

Q. Do you mean to say that down to the present time you have not had more than two or three competitors in New Orleans?

A. For the last few years, yes.

Q. How about Norfolk?

A. That is true in Norfolk.

Q. You have only two or three competitors there?

33215 A. Well, sometimes some fellow happens to bounce in there, but he is not permanent, by any means. He is an in-and-outer.

Q. You said you made your Nazareth mill a basing point. How did you go about doing that? Was it not in the Lehigh Valley?

A. It is in the Lehigh Valley, but regardless of that we made it a basing point, which happened to be the same as the Lehigh Valley.

Q. Back in that early period in the Southeast, do I understand that some territories were buying cement on an f. o. b. mill basis while others were buying it on the delivered price basis?

A. That is right.

Q. And were there Lehigh Valley mills selling in the Southeast at that time f. o. b. mill?

A. Yes.

Q. And were those Lehigh Valley mills selling in other territories at the same time on a delivered basis?

A. I don't know.

Q. Could the dealers in those days buy more cheaply through the distributors, or direct?

A. I think it worked out—

Q. About 1907 or 1908.

A. As I recall it, it worked out about the same.

Q. Did the distributors get it through delivered prices?

33216 A. The distributors were not quoted delivered prices in the Southeast.

By Mr. Wooden:

Q. With regard to distributors, Mr. Koch, I was not referring particularly to the southeastern territory but to other territory where you were active,—Kansas was one, was it not, where they had distributors?

A. Yes.

Q. And I understood from your direct testimony that distributors sold at delivered prices?

A. Correct.

Q. Did they cut each other's delivered prices?

A. I don't know how you would figure that. They were selling on a commission basis, and they probably split their commissions.

Q. Did that have the effect of cutting the delivered prices?

A. It would be another way of defeating the delivered price.

Q. Well, were the distributors' delivered prices ordinarily calculated on basing point plus freight?

A. Those distributors in the West were computing identically with the way we are computing delivered prices today.

33217 Q. You don't know how it was handled in the East?

A. I had no knowledge of the East other than the fag ends in the Southeast.

Q. Did your dealers in the Southeast ask in advance for the change from f. o. b. mill selling to delivered price selling, or did they approve it after you made the change?

A. Well, I wouldn't say they asked for it. I made a sounding by visiting half a dozen points before the mill came in operation, and I told them what I had in mind, and they said that would be fine.

Q. I believe you said it saved them trouble,—one of the advantages they saw in it.

A. Yes. In other words, they knew what it cost them, so that they could fix a re-sale price.

Q. Wasn't it worth while to have some trouble if they could get a lower delivered cost from one manufacturer than from another?

A. You would have to ask them about that.

Q. Well, did you encounter that in your contacts with them?

A. No.

Q. You testified that the principal advantage of delivered prices was to enable you to meet competition at destination; is that correct?

A. Correct; that's one of them.

Q. And you defined, I believe, for us on Wednes-
33218 day—last Wednesday afternoon—what your conception of meeting competition was.

Would you say that you cannot meet competition at destination and sell f. o. b. mill?

A. Not if you have a rigid f. o. b. mill price.

Q. In other words, the difference in freight rates would create substantial variations in delivered prices; is that it?

A. Well, I don't know—

Mr. Brick: (Interposing.) Your Honor please—

A. Sometimes—

33219 A. That all depends upon—

Trial Examiner Norwood: That is, in case there

33220 were an inflexible mill—

Mr. Wooden: Yes.

Trial Examiner Norwood: —or f. o. b. mill or base price?

Mr. Wooden: Yes, it is based on his previous answer.

Trial Examiner Norwood: Yes.

A. That is, all base prices would be the same?

By Mr Wooden:

Q. No; whether they were the same, or even though the base prices were the same, the delivered costs would be different owing to different freight rates, would they not?

A. If you are starting with the same base at various points of production, there would be destinations in which there would be a variety of costs.

Q. Yes. And if the base prices were different there would be still more variations, wouldn't there?

A. There might be.

Q. Now, with regard to selling railroads f. o. b. mill, you sell f. o. b. mill to the line on which your mill is located; is that correct?

A. That's right.

Q. When you sell to a line on which your mill is not located, don't you sell delivered at the junction point?

A. That's right.

33221 Q. Yes. You do not sell f. o. b. destination to that connecting line depending on where they want to use the material; do you?

A. Yes, we sell f. o. b. destination, if they wish to buy it that way.

Q. Well, but they wish to buy it that way; they buy it f. o. b. junction.

A. Oh, well, some of them buy it f. o. b. destination.

Q. Isn't it, as a rule, that you sell them f. o. b. junction point?

A. There might be more purchases made f. o. b. junc—

tion point than f. o. b. destination, but not more barrels, in my opinion.

Q. Why does a railroad care about the destination cost when it hauls it over its own line?

A. So they get the revenue for hauling.

Q. From themselves?

A. What?

Q. From themselves?

A. Well—

Q. They are the—

A. Their structure may be a joint one with a municipality, or something of that sort.

Q. Well, that is an exceptional case, isn't it?

A. I wouldn't say so.

Q. You sell them at junction point, f. o. b. junc-
33222 tion point, whenever they want it that way?

A. That's right.

Q. Without knowing where they are going to use it?

A. Usually they give us a destination.

Q. Well, isn't your price made f. o. b. junction point?

A. That's right, but they ask us to bill it to destination.

Q. You have to deliver it to a destination, of course, but your price is f. o. b. junction point, isn't it?

A. Our price is f. o. b. junction point.

Q. Yes.

A. But they generally give us a billing for a destination.

Trial Examiner Norwood: Well, is that the situation in all cases?

The Witness: No; very frequently; and there is a reason for it.

By Mr. Wooden:

Q. Your f. o. b. junction point price is a different price from the place of use; is it not—the price at place of use?

A. It may be and it may not.

Q. Well, usually it is, is it not—it might be hundreds of miles away from a junction point?

A. You mean we might be a hundred miles away from a junction point?

Q. No, the place of use might be.

Well, I will reduce that. It might be several
33223 scores of miles away from the junction point?

A. Yes.

Q. You might, and the railroad might carry it through

town after town, to get to the place of use from the junction point?

A. It might do that.

Q. Did you mean to say that on direct that the I. C. C.—Interstate Commerce Commission—had ruled that railroads could not pay one seller more than another?

A. I don't think I said that. I had an understanding from purchasing agents that they are held to that.

Q In other words, the railroad could not buy and pay less to one seller than to another; is that your understanding?

A. Sure, they could pay less.

By Mr. Wooden:

Q. Well, I could not understand your statement that the I. C. C. ruled they could not pay more to one than to another, which is the same thing, isn't it?

A. How would they pay more if they bought at less?

Q. That is just what I am trying to direct your attention to. Nevertheless, I made a note, and I checked it up. That is what you testified to.

A. My intent was they could not pay more than 33224 the lowest price. Does that clarify it?

Q. The I. C. C. ruling that they could not pay more than the lowest price?

A. I think that's correct.

Q. You did not state it that way.

A. All right. I am sorry. I intended to.

Q. Going back to your early bids on Government purchases, you said that the Government was allowed a leeway of 10 cents a barrel for different brands. When did that take place?

A. I would say that was 1905 to 1907, perhaps up to 1909 on reclamation work.

Q. Was that leeway based on differences in quality?

A. We had no definite specifications in those days; different departments of the Government had different specifications, and the reclamation service at Denver, after using a certain cement and finding they got good results might have preferred that in the next purchase.

Q. You cannot say whether it was a basis of difference in quality?

A. I don't know just what they based it on, other than what I have recited.

Q. In the early days didn't you quote the Government

f. o. b. mill and make the quotations the same as your base price?

A. We did, and we have since—

Q. When did you begin to quote only where you
33225 knew the destination?

A. Well, I think we always knew the destination, except the last few years.

Q. Wasn't it along about 1927 or 1928 that you changed your policy because you were not getting sufficient awards on an f. o. b. mill basis?

A. Well, we made a change in our method of quoting, yes.

Q. About that time?

A. Yes, or shortly thereafter.

Q. Do you mean to say that when you were quoting the Government f. o. b. mill in that period that you never got any awards at all?

A. Well, of course, we got awards but our mill—our f. o. b. mill price might have figured back from the destination cost.

Q. It was your policy, even then, was it not, to make your Government bid price the same as your commercial price at given destinations?

A. No, not always. You started back from a commercial destination price, and endeavored to give them the advantage of their land grant.

33226 By Mr. Wooden:

Q. When are you speaking of?

A. Oh, I would say that followed up from 1909 and '10, all the way through, more or less.

Q. Well, you sometimes, you testified a few moments ago, quote the Government the base price.

A. That's right. There was no regularity. You would do it one way or another, just as you do now.

Q. You protested, as I understand it, that f. o. b. mill bidding was unfair in 1927; is that correct?

A. No, I don't think we protested that f. o. b. mill bidding was unfair. We protested that when the—they asked for price f. o. b. mill, and awarded f. o. b. destination, or destination cost, that the proposal was not fair.

Q. Is it your view that it was unfair for the Government to award the contract on the basis of an f. o. b. destination cost that was lower than your mill price plus freight?

A. I am inclined to think, Mr. Wooden, that if they had given us the destinations they might have secured lower destination costs.

Q. Can you answer my question?

Trial Examiner Norwood: Read it.

(Last question read by Reporter.)

A. To the extent of my answer just given, yes.

By Mr. Wooden:

33227 Q. You testified on page 32721 (referring to official record) that some Government departments accepted only f. o. b. mill bids. What departments?

Mr. Brick: Your Honor please, I wonder if we might have some reference to his testimony on that? I don't recall that statement.

Trial Examiner Norwood: Read the question.

Mr. Hitchcock: What is the page of the record?

Trial Examiner Norwood: Read the question.

(Last question read by the Reporter.)

Trial Examiner Norwood: Did you so testify?

The Witness: I don't recall.

Mr. Brick: I think he might have added— If Your Honor please—some further qualification, and I am a little bit confused as to whether there were qualifications.

Trial Examiner Norwood: Well, Counsel is looking up the record.

Mr. Wooden: Here it is in line 10 of the record: You say: "Some departments take only an f. o. b. mill price."

Mr. Withrow: Read the rest of the statement.

Mr. Wooden: "Which is finally figured out to their f. o. b. destination cost."

Mr. Withrow: Read the whole paragraph.

Trial Examiner Norwood: Yes.

33228 Mr. Brick: My suspicion is correct, then.

Do you want to read him his question and answer, Mr. Wooden, so he can—

Mr. Wooden: I do not think it is necessary.

Mr. MacIntyre: Cannot the witness give us the facts now, as he recalls them? Would he recall them any differently than he did the other day? Let us have it if he does.

Mr. Withrow: He has not been asked to recall the facts.

Mr. Wooden: I asked him to name the departments that he referred to there.

Trial Examiner Norwood: You may ask him what he testified to.

Mr. Brick: All right, sir.

Trial Examiner Norwood: Answer that.

A. I have in mind at the moment that the Procurement Division asked for the so-called Good Friday bids.

By Mr. Wooden:

Q. Is that all you had in mind?

A. And several others since then, and they made no awards other than an f. o. b. mill.

Q. As a matter of fact, don't you know that the Procurement Division had to back-down on its effort to get f. o. b. mill prices and accept only destination prices?

33229 Mr. Brick: I object to that.

A. I do not.

Q. Can you tell me what departments of the Government now take only an f. o. b. mill price which is finally figured out to their f. o. b. destination cost?

Mr. Brick: Of course, that is subsequent to the complaint—it is right in the question, if Your Honor please.

Mr. Wooden: Well, so is his testimony. I am talking about his direct testimony.

Trial Examiner Norwood: Answer the question.

The Witness: Let me have that question.

Trial Examiner Norwood: Read it.

(Last question read by Reporter.)

Trial Examiner Norwood: I do not see that it
33230 would do any good to go into this matter subsequest to the complaint.

Now, answer that as to—

Mr. Wooden: (Interposing.) I wouldn't have, if he had not said that on direct, Your Honor.

Trial Examiner Norwood: Well, I just do not recall.

Mr. Wooden: I asked him if he had anything else in mind other than the Procurement Division's Good Friday bids.

Trial Examiner Norwood: Answer the question.

A. Something similar to that.

By Mr. Wooden:

Q. Well, I ask you to name them.

A. I can't name them at the moment.

Mr. Brick: Do you know if it was subsequent to the issuance of the complaint, Mr. Wooden?

Mr. Wooden: Whatever he meant by his direct testimony.

Mr. Brick: Well, I think his direct testimony speaks for itself.

Trial Examiner Norwood: Well, I think he may bring out the explanation here.

Answer the question.

(Mr. Brick hands official record to the Trial Examiner.)

33231 The Witness: Read the question.

Trial Examiner Norwood: Read the question.

(Last question re-read by Reporter as follows:

"Q. Can you tell me what departments of the Government now take only an f. o. b. mill price which is finally figured out to their f. o. b. destination cost?")

The Witness: Would you do that again? I was thinking of something else.

Trial Examiner Norwood: Read the question.

(Last question again re-read by Reporter.)

A. I don't know as I understand that entirely, Mr. Wooden.

By Mr. Wooden:

Q. Well, I did not understand your direct statement. That is why I am asking you, simply asking you to name those departments.

A. Well, those Procurement Division proposals said they were for any governmental department.

Q. Is that all you had in mind, the Procurement Division's Good Friday proposals?

A. Well, several others that have come out similar to them, the West Virginia, Colorado—I can't enumerate them all.

Q. What did you mean by saying that they took only an f. o. b. mill price? You mean they won't buy any cement except that way?

A. Yes.

33232 Q. Now, name—

A. Or—

Q. Name some of the departments that have refused to buy cement because they couldn't get it f. o. b. mill?

A. Well, I would say whatever is included in the Procurement Division proposals.

Q. Well, again you come back to that, that is all you meant by this testimony, is it?

A. That's the principal thing, yes, that occurs to me.

Q. Can you name anything else?

A. Not at the moment.

Q. Was any compilation of land-grant rates made by the Institute, or any organization of competitors, before N. R. A.?

A. Not to my knowledge.

Q. I believe you said that the control clause that developed during the Code period on Government purchases was a good thing in view of your 1927 experience.

A. That's the way we felt about it.

Q. In other words, that control clause enabled you to meet competition at destination?

A. Destination cost?

Q. Yes.

A. Yes.

Q. It enabled you to match prices of competitors at destination, didn't it?

33233 A. It enabled me to meet the lowest price.

Q. Well, meeting competition, you defined for us the other day, was matching delivered prices?

A. I didn't define it that way. You referred to my Texas testimony. There was further testimony there.

Q. You admitted that you had so testified?

A. That was one statement.

Q. Now, is it your testimony that the control clause developed under N. R. A. and put out under the auspices of the Code Authority, did not represent any agreement or understanding among competitors?

33234 A. My recollection is, as I am sure I testified, that some one filed the destination cost with the control clause. There was nothing of an agreement. We could file anything we wished to, but I thought well of it, and we applied it to our business.

By Mr. Wooden:

Q. It was just what you needed in order to enable you to meet competition?

A. I thought that it might help me overcome some of the 1927 experiences.

Q. When you testified that in 1931 you went below your

out-of-pocket costs, did you mean that your mill went below those costs?

A. Yes.

By Mr. Wooden:

Q. As I understand it, when you got this photo-
33235 stat evidence of a northern competitor, whom I believe you identified as Marquette, it caused you to put in a 75-cent base price at Cape Girardeau. Has there not been a base price in there at Cape Girardeau before you made that 75-cent price?

A. My recollection is that there was.

By Mr. Wooden:

Q. Had that base price been put in by Alpha at Cape Girardeau?

A. Not to my recollection.

Q. What was your base price at other Lone Star mills at the time you put in the 75-cent price at Cape Girar-
deau?

33236. A. Which mills?

By Mr. Wooden:

Q. Those of the Middle West, say, in Indiana, Kansas.

A. I cannot say, Mr. Wooden.

Q. It was higher than 75 cents, was it not?

A. Oh, yes.

Q. Did you quote a price to the State of Illinois along about that time, based on LaSalle, Ill.?

A. I computed some prices either in 1931 or 1932 to the State of Illinois for highway work, on which I computed my destination price based on LaSalle?

Q. You did not have a mill there?

A. No, sir.

Q. Why did you base on LaSalle in that case?

A. We had not been getting any business over there, and as far as we could find out LaSalle was the man that was setting the price, and we sought to meet such price?

Q. That was Marquette, too, was it not?

33237 A. I think it was.

Q. Is it your testimony that even under the N. R. A. Code there was always price cutting going on?

A. Yes, to a limited extent.

Q. Much more limited than at other periods?

A. Oh, my yes.

Q. Can you tell us when and where the last instances occurred that you described in your direct testimony, showing the various methods of indirect or secret p.ice cutting that occurred?

A. Which method have you in mind?

Q. Well, you gave us quite a description of various methods of cutting prices, such as making excessive bag allowances and rebates.

A. Free cement?

Q. Yes; all sorts of methods. When was the last instance of making price cuts through bag allowances, as you have described?

A. I don't know that the last occurrence has come to light yet, but I will give you the last one that I have in mind.

Q. All right.

A. The last time is on gravel. I have Shiloh Park, Tenn., or Pittsburgh Landing in mind, where we had a good contractor-customer.

Q. When was this?

33238 A. In 1935 or 1936 and a competing cement company would bring in what is known as a sand and gravel producer, with portable equipment. As best I can recall, his name was Happy Katinsky. He failed to produce the sand and gravel at the prices that the cement company named. However, the cement company made good and secured the sand and gravel elsewhere, at much higher costs, according to our contractor friend.

Q. What competitor was that?

A. Unfortunately, that is the Marquette Cement Manufacturing Company.

Q. At Pittsburgh, you say?

A. No, at Pittsburgh Landing, Tenn.—Shiloh Park.

Now, as to discounts, there were several outstanding cases in New Jersey in 1931 or 1932. One was a contractor by the name of Gentile, where we secured the photostatic evidence of his payments for the previous job just completed.

Q. There was a lot not only of secret pricing cutting, but open price cutting in 1931; was there not?

A. Well, the only open price cutting, if you consider it as such, I imagine, was when bids were made public.

Q. Yes; there was a good deal of it, was there not?

A. There was in the Mid-West.

Q. Can you give us instances since 1935, in addition to the one you described a moment ago, where these various indirect methods of cutting prices occurred?

33239 A. Well, they are going on constantly, in one form or another.

Q. Can you describe any, like you did the Pittsburgh Landing case?

A. Yes, there were some of those going on in 1938, which caused us to take our action in the State of Mississippi, but Your Honor ruled it out, because it is since this case was started.

Q. All right; between 1935 and 1937.

A. That only gives me one year.

Q. No; two years, or take three years—1935, 1936, and 1937.

A. They were going on in Mississippi in 1937.

Q. That is the thing that ran over—

A. That is the thing that caused us to take action in 1938.

Q. Yes. Anything else?

A. Well, there was an adjustment on volume of cement made over in Massachusetts by the Penn-Dixie Company, I would say in 1935 or 1936.

Q. What kind of an adjustment?

A. Contractor handling bulk cement or using bulk cement. I think he contended he did not get all the cement he was billed for. We were supplying on the job, and stood our ground, because there were scales. The other man made an adjustment with him.

Q. Were not these various indirect methods of

33240 price cutting, secret price cutting, condemned under the Code of Ethics of the Institute, and also under the N. R. A. Code?

A. They were under the N. R. A., and I think in our pamphlet we said that we would try to live up to what was set forth therein.

Q. Were they not condemned in the Code of Ethics of the Institute that preceded the N. R. A. Code?

A. That I can't say.

Q. Were they not condemned in the Compendium put out by the Institute?

A. If the Compendium was turned out after the Code, I would say so, yes; but I really don't know all the contents of the Compendium.

Q. Mr. Koch, in reference to this executive order allowing a 15 percent reduction in filed prices on Government bids, would you say that there was no agreement or understanding under the Code to maintain filed prices?

A. I don't know. I take it we could have exercised our privilege under that.

Q. You did not take that into account when you testified that there had never been any agreement or understanding with your competitors to maintain prices?

33241 A. Do you mean agreement through the Code or agreement outside of the Code?

Q. Through the Code, expressed in the Code; yes.

A. Well, if that was the ruling of the Code Authority, it stands by itself. I do not know how they arrived at it.

Q. Well, would you class the provision of the Code that filed prices should be maintained as an agreement among competitors?

33242 A. I do not know that. I do not recall that the Code Authority ever put out any instructions on it.

By Mr. Wooden:

Q. You did not conceive the Code as being an agreement or understanding among competitors to maintain the prices that they filed with the Code Authority?

A. I thought we were limited by law. If we filed a price, that was our price until somebody else filed, or we, in turn, filed again.

Q. Then, this executive order that gave you permission to reduce your prices by 15 percent; you say you did not make any reduction?

A. No.

Q. Is it your idea of an agreement or understanding that the executive order relieved you of your obligation to maintain your filed prices on Government bidding?

A. I would think so.

Q. You were relieved from it, and yet you made no change in that respect; you did not take advantage of it?

A. I would not have called that an advantage of it. I would have called that a loss.

Q. Well, you did not act on it.

33243 Coming to this matter of the Lone Star's definition of dealers, has not the Lone Star definition frequently been the same as the definition which dealers' associations wanted?

A. I cannot answer that, Mr. Wooden. What the deal-

ers' associations would want and what we would want would be two different things.

Q. Well, they frequently told you what they wanted by way of definition of dealer.

A. Well, they have told us a lot of things that we have not always complied with.

Q. But they did tell you that?

A. They did tell us what?

Q. What they wanted in the way of definition of dealer.

A. I have no recollection of their telling us that.

Q. Did any of your executives participate at the meetings in Chicago in the Spring of 1935 with the dealers' associations' representatives?

A. I am confident they did not.

Q. You said that the dealers' associations attempted to influence your policy.

A. Well, that is part of their business.

Q. Sometimes what you do coincides with what they want you to do.

A. We may give weight to their thoughts. We don't just turn them down cold and say, "No."

33244 Q. Sometimes what you decide to do is what they want you to do; is not that so?

A. Not entirely; no, sir.

Q. Sometimes?

A. Never, as I recall it.

Q. Never?

A. No.

Q. Would you say that when you put out your announcement of sales policy containing a definition of "dealer" in 1935, it did not coincide with what the dealers' associations wanted?

A. I don't know just what they wanted.

Q. Then, when you said a minute ago that they never coincided you did not know what you were talking about?

A. Well, I mean, what I do know is that they wanted you to sell 100 percent through them.

Q. Yes; I know—

A. They would want you, perhaps, to limit your sales to association members.

Q. Do the dealers' associations provide you with lists of people that they consider regular dealers?

A. I have never seen them.

Q. You do not know whether they provided you with them?

A. No.

Q. Have you not inquired sometimes of dealers' associations as to whether some parties are termed regular dealers?

33245 A. Well, I might do that.

Q. You have done it, have you not?

A. Undoubtedly.

Q. Your policy of selling for delivery only to a dealer in his own community, where he has a yard or warehouse, is in accordance with the dealers' associations' wishes, is it not?

A. I would not say that; no, sir.

Q. Well, they do stand for that, do they not?

A. Not that I know of. They may in certain sections; in others, no.

Q. In certain sections, then.

A. That has always been a policy of mine, but there are a number of others that do not follow it at all, and I have known dealers that want to sell all over.

Q. Of course you have, and you refused to sell dealers who asked for delivery at other than their particular places of business?

A. That is the Lone Star Company's policy.

Q. Yes, and dealers' associations have stood for that policy, too, haven't they, and urged that policy?

A. They have and they have not.

Q. Which ones have and which have not?

A. I would say, generally speaking, that lumbermen's associations would stand for that policy. I would say that hard material dealers in big cities, and perhaps from the Illinois line east to the Atlantic Coast, and south to

33246 the Gulf, would want to handle otherwise.

Q. Would want to handle otherwise?

A. Sell all over.

Q. I am talking about dealers' associations now. I am not talking about individual dealers.

A. Well, isn't a dealer association—isn't a hard material dealers' association just as much an association as a lumbermen's association?

Q. I want to know whether it is your testimony that dealers' associations representing dealers handling cement, have not taken the position that sales ought not to be made even to a regular dealer at any place where he does not have a yard, or place of business?

Mr. Brick: Your Honor please, the witness has answered that question three times.

Trial Examiner Norwood: Let him answer it again.

Mr. Wooden: He has gone all over.

Trial Examiner Norwood: Go ahead.

A. They may and they may not; it all depends upon the territory.

By Mr. Wooden:

Q. Now, as I understand it, when you sold for a while to Dallas, Texas, dealers for a truck delivery, that was for delivery only in Dallas?

A. That was the intent, originally.

33247 Q. And is that the same with regard to Houston dealers?

A. Yes.

Q. For delivery only in Houston?

A. Well, they couldn't go very far in the early days; they didn't have good roads.

Q. And was the same thing true in Norfolk when you delivered to trucks at the Norfolk city price?

A. I don't think we drew the line there.

Q. Well, didn't your dealers, then, from outside of Norfolk take that cement in trucks and take it to their other—take it to the towns where they did business?

A. Well, to the best of my recollection, there was very little of that.

Q. That occurred up in the Pennsylvania district, did it not, when sales were made to trucks at the mill?

A. I can't say as to that. We had so very little of that, Mr. Wooden, at our mill.

Q. Is it your claim that the delivery of cement to dealers' trucks at the mill didn't have any effect upon delivered prices?

A. It might have; but the principal trouble was the friction with the dealer out at the community where he normally did business.

Q. Well, some of the dealers complained because their competitors who did truck were unable to sell them, didn't they?

A. Well, I don't know as they complained just like that.

33248 Q. Wasn't that the basis of their complaint?

A. That somebody who was not located in that

market was taking the market from them which they felt rightfully belonged to them.

Q. And by underselling it.

A. Well, I assume so; that was probably part of it.

Q. And even dealers in the same town, if one of them trucked he sometimes undersold his local competitors, didn't he?

A. He did until his competitor began trucking, and then they were on the same equality again.

Q. And he got the cement delivered in his trucks there at less than the destination price figured by rail, too, didn't he?

A. That I don't know.

Q. Well, would he buy it and truck it unless he thought he was going to get it cheaper?

A. Sometimes a man will do something that he thinks will work out, that doesn't.

Q. You didn't have any serious trouble with claims for damage in transit by a truck when the dealer provided his own truck, did you? What responsibility was that of yours?

A. The unfortunate thing was the dealer hired trucks.

Q. Even so, you were not responsible for a delivery by the means that he provided for transportation, were you?

A. I feel as you do, Mr. Wooden, but he looked 33249 to you as being the responsible party, and what he could take out of you, he did.

Q. Now, you talk about trucking out of your Washington silo. What is that Washington silo price, and how is it based, since 1931?

A. When we first established the Washington silo we met the lowest price that we found in the Washington market for deliveries from that silo to trucks.

Q. And what was the Washington price based on at that time?

A. I can't say definitely, either—whether it was on the Lehigh Valley or on Union-bridge.

Q. And you made a Washington silo price equivalent to the delivered price based on one or the other of those bases; is that right?

A. I met the lowest price that I found in the Washington market f.o.b. car, which I applied to my price, f.o.b. truck at my silo.

Q. How long did that situation last?

A. Well, our competitors were pretty active, secured

warehouses and other arrangements, and the price began to go down.

Q. Did the Washington price later return to the equivalent of some base price, plus rail freight to Washington?

A. I am not sure of that; it may have just before we put in the bases which we are using now.

Q. Didn't it go back to the regular base price plus
33250 freight in 1932?

A. I can't say as to that.

Q. What was it during the Code period?

A. Well, whatever was filed.

Q. Well—

A. Whether it was base or not, I can't say, Mr. Wooden.

Q. Can't you tell what the basis of it was?

A. No, I can't do that.

Q. Can't you say what the basis was in 1936?

A. No, I can't.

Q. Or '37?

A. '37 we changed the basis.

Q. To what?

A. To our Norfolk base, plus our estimated cost on bringing the cement into Washington.

Q. By water?

A. Yes.

Q. From what to what did you change it?

A. I can't say from what to what, but I took off 30 cents in the f.o.b. market price, and five cents in the warehouse price, so the sum total I took off was 35 cents.

Q. You said with regard to your policy of selling dealers who handled imported cement, that you treated them or considered them as competitors?

A. That's right.

33251 Q. Is that right?

A. Yes.

Q. Why didn't you consider dealers who handled domestic cement of your competitors as competitors?

A. I do consider him a competitor to a certain extent, and if he did not push my cement I would look around and get me another dealer.

Q. But you do not consider him a competitor to the extent of refusing to sell him because he handles competitive cement, do you?

A. Well, not if he uses competitive domestic cement; I think there is a wide difference there.

33252 Q. Mr. Koch, how much difference was there between the cost of your water transportation from Norfolk to Washington and your rail transportation?

A. The rail rate now, I believe, is 17 cents a hundred—17 or 18, which is the equivalent to 65 or 68 cents. My estimate on the water transportation, with the incidental handling charges, is 20 cents. I am speaking now per barrel.

Q. And you reduced your price by—what was it, thirty or forty cents a barrel?

A. Thirty-five cents a barrel.

Q. Thirty-five cents.

A. Yes.

Q. Do you sell out of your Washington silo for delivery by rail?

A. Very little. We would if we thought we could get enough net realized.

Q. Do you sell to trucks out of your Washington silo without regard to the destination where the cement is to be taken?

33253 A. We do not attempt to control it at all.

Q. Well, do you sell without regard to the destination where the cement is to be used?

A. Yes.

Q. How long have you been doing that?

A. Since—or, I think all the time, but especially since early in 1937.

Q. Why do you say especially since then?

A. Well, since we reduced the price to the extent that I described this morning, there wasn't much purpose of it before, as I recall.

Q. Do you mean to say that anyone can buy at your Washington silo at your Washington price, take it in a truck, and take it any place they like?

A. Anyone that we consider a dealer entitled to dealers' price.

Q. At the point—he has to be a dealer at the point where he wants to use it, though?

A. Well, he would have to be a dealer at some point.

Q. He would have to be a dealer at the point where he wants to use it, wouldn't he?

A. I don't think so.

Q. Or, at least, you would not permit him to take it

into the territory where other dealers were located, and where he was not located?

33254 A. Yes, I would.

Q. How do you reconcile that with your testimony this morning that you make it a policy not to sell to dealers except for use at the place where they operated a yard or warehouse?

A. Well, we give them the privilege, in this case, of coming to the Washington warehouse, or taking it in carlots.

Q. That is an exception, then, to your general policy?

A. And that is an exception in the Washington case where we make carload prices, or depressed our carload prices, so that they are not made up of a base plus a railroad haul.

Q. Aren't there only certain destinations to which the Washington silo price is attached?

A. I don't know as I understand that question, Mr. Wooden.

Q. Let me put it around the other way:

Have you always permitted, at your Washington silo, a dealer— Would you have permitted a dealer, say, located at Methesda or Frederick, Md., to come to your Washington silo with his truck and buy cement and take it to Bethesda or Frederick and sell it there?

A. Yes.

Q. Did you figure in such cases the destination price at Frederick or Bethesda, as the case might be?

A. We approximated it by what we would term feathering out our destination prices, as far as we thought the trucking influence would reach.

33255 Q. Well, you had a list, did you not, of destination points?

A. That's correct.

Q. To which you made arbitrary delivered prices?

A. That's—that's right.

Mr. Brick: Your Honor please—

Q. Based on your Washington silo price plus some form of transportation?

A. That's correct.

33256 Q. What I want to know, Mr. Koch, is whether if a dealer from Frederick, Md., came to your Washington silo with a truck, you would quote him the Fred-

erick, Md., price or would you quote him the Washington silo price?

A. The Washington silo.

Q. Would you sell at the Washington silo to any dealer without knowing where it was going to go?

A. I think so.

Q. At the Washington silo price?

A. I think so.

Q. And you have been doing that since 1937?

A. So far as I know, yes—the State of Maryland, also.

Q. And did you discontinue the making of sales to trucks at your Washington silo during some period after you opened that silo?

A. No, sir.

Q. No difference in the extent to which you made deliveries to trucks at the silo, in terms and conditions?

33257 Mr. Wooden: I should say "Was there no difference?"

Mr. Brick: You might add that.

A. None that I recall.

By Mr. Wooden:

Q. Did you not sell for truck delivery at a higher price than you did for other delivery?

A. Oh, that is true.

Q. How much difference was it?

A. Five cents.

Q. Over what period of time?

A. I cannot say—maybe a couple of years.

Q. Did you put that five-cent charge on during 1931 or 1932?

A. No, we did not have it on in 1931 and 1932. The price was put out by one of our competitors. When they lowered their price, it was the low price that we found, and we just met the condition.

Q. How long did the five-cent price continue?

A. So far as I recall, a couple of years.

Q. And has not been in effect since about 1932 or 1933, or when?

A. It was not in effect at first. It probably went
33258 into effect in 1933 or thereabouts—no, I think it was later; possibly 1935, and wiped out in 1937.

Q. While you were compiling freight rate information

through your own efforts—your own company's efforts, and obtaining information as to freight rates from other points than the location of your own mills, how did you obtain such information?

A. From the tariffs.

By Mr. Wooden:

Q. Did that involve any checking at the location and points of the other mills?

A. How do you mean, checking at the location points?

Q. I mean, did you have to send anyone or write or get information from the location points of the other mills, or could you just do it by sitting in your office with your tariffs?

A. Well, you usually have these directors of cement plants that are put out by the manufacturers of machinery, that show where a plant is located and its capacity, and you write down the information, and then the tariffs generally specify, also.

Q. You have to at least send and get the tariffs

32259 covering the shipping rates from those other mills?

A. Oh, you have to get the tariffs, get put on the tariff mailing list, and see that you keep all amendments up, and occasionally write the railroad to find out why it does this and why it does that.

Q. Do you want to be understood in connection with your direct testimony, regarding your policy of not selling dealers handling foreign cement—did you want to be understood as saying that from time to time you began that policy in 1926 or thereabouts, that that was your continuous policy and practice thereafter?

A. No, sir. My policy has varied, according to the emergency and acuteness of it.

Q. Now, in the statement that was put into the record in the form of a stipulation covering what would be your testimony regarding diversion in transit, on page 32775, was not one reason that is not mentioned there, that if shipments were diverted in transit it would interfere with the maintaining of an identical delivered price at the destination to which the shipments were diverted?

A. No.

Q. Do you mean that that is not a reason that has entered into it?

A. Not a reason as you stated it; no.

Q. Well, it would interfere with your delivered
33260 price there, would it not?

A. It would interfere with my customer there.

Q. And it would interfere with your delivered price?

A. It would lower my delivered price at that point, if it was diverted from a low-price section into a high-price section, and you would not get the freight.

Q. If your delivered price were lowered by that diversion-in-transit transaction in a particular case, it would be lower than the delivered price of your competitors there, would it not?

A. Well, they could divert just as well as I could.

Q. But I am talking about a particular diversion in a particular transaction.

A. Yes; but I do not look at it that way, Mr. Wooden. I look at it from a different angle.

Q. If they permitted diversion in another case, your delivered price would be higher than theirs, and if you permitted diversion in another, yours would be lower than theirs; is not that right?

A. I can't have anything to do with that. I am looking for the lowest price that I have to meet—

Trial Examiner Norwood: Wait a moment. Answer his question.

Read the question, and state whether or not that is the case.

33261 The Witness: Give me the question.

Trial Examiner Norwood: Read the question.

(Last question read by Reporter.)

A. Not always.

By Mr. Wooden:

Q. It would be frequently the case, wouldn't it? Isn't that what the diversions—

A. That is the—

Q. What is it? Finish.

A. That is generally what the diversions are made for.

Q. In order to get the delivered cost lower than the regular delivered cost?

A. Well, sometimes they are made also to defeat the price of a local dealer, who is doing business there and paying taxes, and so forth and so on.

Q. If you had a destination point where there was only one dealer, you would not permit him to divert, either, would you?

A. No, as a matter of principle, no.

Q. And you would not allow diversions to be made to a point where there was only one dealer?

A. Well, I wouldn't allow a diversion to be made under any condition.

Q. Now, so far as your mill net is concerned, in the territory where your base price controls—

A. Yes.

33262 Q. —you get the same mill net on that diverted shipment that you would if it were not diverted, don't you?

A. Yes, I would.

Q. And even where your mill base price does not control, you get the mill net on the shipment just the same as if it went to the point to which first consigned?

A. Well, I am defeated in my opportunity to make a sale at the point to which it is diverted, because of this diversion.

Q. The next time, you mean?

A. At that time.

Q. But you get the mill net that you are willing to take on the destination on which sold?

A. That's right.

Q. Regarding this booklet of yours, "Trade Ethics and Marketing Policies," you said it was withdrawn in June, 1930?

A. That's right.

Q. How was it withdrawn?

A. By a notice to the trade with a circular letter.

Q. You mean you actually collected them, asked for them to be returned, or—

A. No, we issued a circular letter, Mr. Wooden, stating that we found the competitive conditions were such that we could not follow everything we stated there, and carry on our business.

Q. Is such a circular letter available?

33263 A. That I can't say; there is none here, so far as I know.

Q. I wish you would produce one, if you can.

Mr. Brick: We will take that under consideration, Mr. Wooden:

By Mr. Wooden:

Q. Didn't you, after June, 1930, send out some of those booklets "Trade Ethics and Marketing Policies"?

A. If we did we sent them out because some one requested it.

Q. Do you recall sending any to any of the State officials in 1933?

A. Not unless they were requested or had a bearing on some portion—

Q. Well, do you recall sending them?

A. No, I do not.

Q. Now, with regard, Mr. Koch, to your testimony concerning the absence of any agreements or understandings with competitors, or discussions or conversations with them, hasn't it been the policy of your company to instruct its employees not to make any record of such conversations and contacts with competitors?

A. Not that I recall.

Q. (Showing document to witness.) I am showing you Commission's Exhibit 2422,—don't you recognize that as an instruction from your Mr. Neylan to two of your employees in Texas, to refrain from making a record
33264 that might be embarrassing, of their contacts with competitors?

A. I hadn't seen that until this case started, and when it appeared in an exhibit.

Q. You recognize that as Mr. Neylan's communication, don't you (referring to Commission's Exhibit 22422)?

A. This is Mr. Neylan's initials on the bottom,—his signature.

Q. You didn't know that that was being done in your organization?

A. Well, I think, as I recall, that since it came to light, it didn't have to do with conversations, as I recall it, with competitors. It had more to do with making certain references to the individual habits of some of our competitors in Texas, at that time.

Q. Well, now, I will just call your attention to this language here in Commission's Exhibit 2422:

"If there is anything of a strictly confidential nature, such as personal talks had with representatives of your competitors, or any information of a character that might possibly be subject to criticism, and might under a strictly legal interpretation be classified as evidence of collusion, it can be handled by a pencil note which can be attached to your regular report, and which we will detach in this office and destroy. We do not want any reports sent in

marked "Personal, confidential, destroy, or no copies made."

33265 Now, do you still reiterate your statement that that did not relate to conversations with competitors about competitive matters?

A. To the best of my knowledge—

Q. The fact of the matter is, that you don't know anything about it?

Trial Examiner Norwood: Did the witness answer the last question?

33266 The Reporter: He made a partial answer when there was an interruption and an objection made.

Trial Examiner Norwood: Answer the question.

The Witness: What was the question?

Trial Examiner Norwood: Read it.

(Question read by Reporter.)

A. I think it did.

By Mr. Wooden:

Q. Well, as a matter of fact, there are some things that go on in your company that you may not know about; is that right?

A. I can't keep track of all of the personal rules of some of them.

Q. Is that Mr. Neylan's writing in the upper lefthand corner, the two names, Morgan and Oldham?

A. No; I don't know whose it is.

Q. You don't know whose it is?

A. No. This is Mr. Neylan's on the bottom.

Trial Examiner Norwood: You testified in regard to prices, and I want to clear up one thing in that connection.

How do you receive information of competitor's prices?

The Witness: In the field, I adopt the methods I have noted, and that others have described. I have used some other methods when I was in the field, by getting a

33267 dealer to call up a manufacturer, without the manufacturer's knowledge of why the dealer was calling.

Trial Examiner Norwood: You rely upon your salesmen and the dealers?

The Witness: Yes.

Trial Examiner Norwood: And dealers often report?

The Witness: Oh, my, they might call you on a Sunday.

Trial Examiner Norwood: Well, in the case of a price raise, would they quote that, too?

The Witness: [illegible] as quickly, sometimes, as on the decline, but they do ask you what is going on in the market, and you say, "Well, what have you on your mind?" "Well, we received a quotation from so and so," and he tells you.

Redirect Examination by Mr. Brick.

33268 Q. At the beginning of your cross-examination, Mr. Koch, Mr. Wooden put to you a question and answer from Commission's Exhibit 2956-T, for identification, that being part of the transcript of the case in Texas, about which you testified. Do you recall that?

A. I recall him reading from it.

Q. Well, he put this question to you from the testimony in the Texas case, the question being:

"Q. What is your definition of competition on a price basis?"

Then, Mr. Wooden asked you if the following was your answer:

"A. I always construed the word 'competition' as matching prices or in placing yourself in a position to solicit an order on a standardized product on equality with the other man."

And I believe you testified, Mr. Koch, that that question was put to yu and you made the answer to which Mr. Wooden referred. Is that correct?

A. Yes, that was part of the answer, anyway.

33269 Q. And, now, I would like to bring that same exhibit to your attention and ask you if this question was put to you in the course of your testimony in the Texas case:

"Q. Would you say it was free competition to seek business on the basis of the better price than your competitor can give?"

Do you recall that question?

A. Yes.

Q. Now, I ask you if the following was your answer to that question:

"A. We have done that. We did that when we put a base on our Houston plant. If the other fellow meets it, then these prices again equalize."

Was that your answer to the question which I quoted?

A. Well, that is my answer, as I recall it. Of course, that is applicable everywhere.

Q. I will let you refresh your recollection from the transcript (handing a document to the witness).

Mr. MacIntyre: May we have the document marked that the witness is now examining?

33271 (The bound volume was marked for identification "Respondents' Exhibit 2377.")

33272 Q. I show you page 1828, and ask you—

Q. Now, I ask you if this question was also put to you in that proceeding, Mr. Koch:

"Q. After they equalize by the addition of a basing point, is it free competition to attempt to get business by quoting a better price reflected by lower cost of production or better operation than your competitor quotes?"

And I ask you if the following was your answer to that question:

"A. Yes, that would be free competition. He has that right and that privilege, and nothing to prevent it."

Did you make that answer to the question?

A. Yes; I would say so.

33273 Mr. Brick: May I ask the Reporter to mark these two pages, please, as a Respondents' exhibit.

Trial Examiner Norwood: Is that two pages of one document, or two separate documents?

Mr. Brick: Well, I think they could be lettered "A" and "B", Your Honor, with the same number. They bear a relation to each other.

(The pages referred to were marked for identification "Respondents' Exhibit 2378-A and 2378-B.")

By Mr. Brick:

Q. Mr. Koch, do you recall your cross-examination relating to Mr. Wooden's reference to a master price book which you said was kept in the various offices of your company?

A. Yes.

Q. Do you recall Mr. Wooden having asked you to describe the contents of that book?

A. I don't know whether he said contents; he asked me to describe the book.

The witness identified Resp. Ex. 2378 A and B as the first sheet out of what he termed Lone Star's master price book, covering the Kansas division.

Examination by Trial Examiner Norwood.

33274 The other sheet is what he was endeavoring to describe to Mr. Wooden this morning. These sheets are ruled on the back. Unfortunately the photostat was not taken that way; so that when this sheet comes over this way, the other one comes into play, and it gives "you" the flat lined book (indicating). The dark marks there indicate where the ring binder goes in so that "you" have named "your" cement dealers over here, over here, more here (indicating), that is for incor, "you" have different sources of supply up here (indicating) "you" have rates • • • "you" show when "you" made the price changes. The paper numbered "B" then as "you" face the book, would be to the left. That would be the back of the preced-
33275 ing page of 2378. It would be facing the one lettered "A", and it is to be taken along with it.

Direct Examination by Mr. Brick.

The names appearing on the lefthand column on Resp. Ex. 2378 B are the names of dealers whom Lone Star quotes and who appear on its mailing list. The figures appearing on the lefthand half of the page on Resp. Ex. 2378 A are rates to shipping point or destination per hundred pounds on cement from various sources of supply shown in the page "A" to the town at the right or city perhaps.
33276 The witness identified the figures appearing in the columns under the headings "Dates—Quotations," as Lone Star quotations in circular form, offering cement and the dates on which these quotations were made; so that in respect of the name of a dealer appearing in the lefthand column of Resp. Ex. 2378 B, Lone Star has the name of the dealer, the various rates from sources of supply to his destination and the delivered prices Lone Star quotes with their respective dates.

33279 (RESP. EX. 2378-A and 2378-B was offered and received in evidence.)

By Mr. Brick:

Q. Is there any reference to mill figures appearing on either of these two pages, Respondents' Exhibit 2378-A and B (indicating)?

A. None whatsoever.

33281 *Recross-Examination by Mr. Wooden:*

Q. Mr. Koch, on the same page of the Texas record to which your Counsel called your attention and asked you whether you testified so and so; namely, page 1827, were you also asked this question, in the Texas case:

"Q. Why are all cement prices, or practically all 33282 cement prices, identical?

"A. Where?

"Q. At destination.

"A. Because as I told a Department of Justice man one time when I was much younger in this business, the other fellow couldn't get any more than I could, and if I had my way he couldn't sell for any less.

"Q. In your opinion is it free competition?

"A. Absolutely."

Did you so testify in the Texas case?

A. I don't recall that in the Texas case. I recall something like that many, many years ago out in Kansas.

Q. Well, is that your— Just a moment, I will show you the Texas record wherein it was called to your attention.

Trial Examiner Norwood: Do the pages that we referred to heretofore in Exhibit 2377,—are they marked with the number, record number, in that case?

Mr. Withrow: Yes, the record number in that case.

Mr. Wooden: The page record number.

Mr. Withrow: 1827.

Trial Examiner Norwood: Yes, the record page number.

Mr. Withrow: Yes.

Trial Examiner Norwood: Go ahead.

By Mr. Wooden:

Q. What I am calling your attention to, Mr. 33283 Koch, is Respondents' Exhibit 2377, for identification, and the page 1827 in that exhibit, and I ask you if you did not testify as I read, in answer to the questions which I read?

A. (Witness refers to Respondents' Exhibit 2377) Yes, I would say that was a fair statement.

Q. In other words, you would not, if you had your way, let the other man sell for any less than you, and, by the same token, you would not want to sell for any less than he did?

A. No, I don't think you get the purport of what I had

in mind. What I mean is, Mr. Wooden, he can't get more, and if I am interested in the business I wouldn't let him sell for less, I would meet him.

Mr. Wooden: Your Honor, I think that the testimony ought to be offered verbatim as it appears in that record there, including the portions to which Respondents' Counsel called attention.

Trial Examiner Norwood: You mean that the exhibit should be received?

Mr. Brick: Wait a moment. Who is testifying, Mr. Wooden or the witness?

Mr. Wooden: I am merely stating what I think should be offered. In other words, I would like to offer pages 1827 and 1828 of the Texas record which appears in Respondents' Exhibit 2377, for identification, and which in-
33284 cludes all of the subjects that have been gone into.

Mr. Brick: Your Honor please, I really do not think that that procedure is quite necessary. Mr. Wooden put questions and answers which he got from this Texas record to the witness. The witness said the question was put to him; he made the answer as read by Mr. Wooden. Then Mr. Wooden asked him an addition question, and the witness explained his position.

Trial Examiner Norwood: Yes.

Mr. Brick: In other words, his testimony as it now stands shows that the witness did make the response which is in the record and which Mr. Wooden offers.

Isn't that so, Mr. Wooden?

Mr. Wooden: Yes, he made the response.

Trial Examiner Norwood: I think everything is already in the record that is shown to be relevant and material, and there is no point in putting that in, unless there is something else bearing on the same subject.

Mr. MacIntyre: If Your Honor please, there are only two questions, and the answers which have been given by the witness on recross do not portray the testimony that appears on the other two sheets, in the proper light. We believe that the two sheets that you received in evidence will show the testimony in the proper light, as it was given
33285 at that time, in the form of admissions against interest. We do think that those two sheets should be received in evidence. Furthermore, they explain more fully the two questions and answers that Respondents' Counsel read on redirect, and to which responses were made.

Trial Examiner Norwood: Shouldn't they be re-marked as Commission's exhibit?

Mr. MacIntyre: I think these two sheets could, very easily.

Mr. Brick: You mean to be marked for identification or to be received as an exhibit?

Trial Examiner Norwood: To be received in evidence.

Mr. Brick: I object to their being received, because the same contents are found in the witness' testimony. They add nothing to the record. As a matter of fact, I could state all the reasons which Your Honor stated and Mr. MacIntyre and Mr. Wooden stated to me when I try to offer exhibits which are excluded.

Trial Examiner Norwood: Mr. MacIntyre made it appear to me in just a little different light, and I can see no harm in letting it in. My remark was directed to the lack of necessity for its going in.

Mr. Brick: So is mine.

Trial Examiner Norwood: I think it might as well be received, and we can see then from the context what
33286 the expressions mean, and so forth.

Mr. MacIntyre: May we have the Reporter to mark these two sheets which we have offered?

Trial Examiner Norwood: Yes.

Mr. MacIntyre: And what you received in evidence.

Mr. Brick: I refuse to offer this. This is our compiled copy, and I am not going to separate it.

Mr. MacIntyre: There is the only copy that the witness has been willing to identify as portraying the testimony in the Texas case. We showed him our copies and he would not identify them.

Trial Examiner Norwood: Let the record show that, over objection, the two pages, to-wit, Respondents' Exhibit 2377, for identification, pages 1827 and 1828, are received in evidence as Commission's Exhibits 3245-A and B, respectively.

(COM. EX. 3245-A and 3245-B was offered and received in evidence.)

Trial Examiner Norwood: And Counsel may have his exception?

Mr. Wooden: It will be perfectly all right to have copies of these pages.

33287 Mr. Brick: If Your Honor please, may we have the Reporter copy into the record of this proceeding pages 1827 and 1828?

Trial Examiner Norwood: No, sir; I think they should go in as exhibits. It will be simpler.

Mr. Brick: But I do not like to be put in a position of parting with my record. I do not want to hand my record in that case over to the Reporter.

Mr. MacIntyre: Will you agree to a substitution of a photostat?

Trial Examiner Norwood: When Counsel has asked a witness to refresh his memory from a paper like that, we have followed the rule here that the other side has a right to put it into evidence.

Mr. Brick: May we go off the record for a minute, please?

Trial Examiner Norwood: Off the record.

(There was a discussion off the record.)

Trial Examiner Norwood: Is it agreed that photostatic copies of those two pages may be substituted?

Mr. MacIntyre: Yes.

Mr. Wooden: Yes.

Mr. MacIntyre: But we can have the Reporter number those two sheets, so that they can be substituted. I do not understand why Counsel does not want these two 33288 sheets numbered.

Mr. Hitchcock: There is no objection to that, but I want the book.

Trial Examiner Norwood: As I understand it, those two pages are matters of record in this other case. What case is that?

Mr. Brick: No. 59685, State of Texas against Lone Star Cement Corporation and others.

Trial Examiner Norwood: And here is the record in that case, pages 1827 and 1828—

Mr. Brick: Well, it is our private copy of the record.

Trial Examiner Norwood: And it is agreed that photostatic copies may be substituted. Now, there is no danger of any misunderstanding about that.

Go ahead.

Mr. MacIntyre: Mark these two pages as Commission exhibits.

Mr. Withrow: You have a copy of the record on your desk. Why don't you mark that?

Mr. MacIntyre: If Respondents' Counsel wants these—

Trial Examiner Norwood: Put them up and let them be marked, please.

Mr. MacIntyre: If Your Honor please, if Counsel for the Respondent will only admit that pages 1827 and
33289 1828 in a copy of the record which I hold are exact copies of pages 1827 and 1828 in Respondents' Exhibit 2377, we will be glad to substitute them at this time. I cannot understand what all the mystery is about.

Mr. Brick: That is fine. That is what we originally suggested.

Trial Examiner Norwood: You can verify those.

Mr. MacIntyre: We have not been able to get them to agree that our copies are exactly the same as theirs.

Mr. Withrow: I thought this was all off the record.

Trial Examiner Norwood: Off the record now.

(There was a discussion off the record.)

Trial Examiner Norwood: Go ahead.

Mr. MacIntyre: If Your Honor please, may I ascertain from Counsel for the Respondents now whether they have compared pages 1827 and 1828 of Respondents' Exhibit, for identification, No. 2377, with documents now marked as Commission's Exhibits 3245-A and B, and whether, if they have been compared, they are the same?

Mr. Brick: Yes, they are apparently multigraph copies, as originally prepared.

Trial Examiner Norwood: Well, they will be substituted, then, Commission's Exhibit 3245-A and B, respectively, in evidence.

33290 (The pages 1827 and 1828 of the transcript in the case of State of Texas *v.* Lone Star Cement Corporation and others, No. 59685, were thereupon marked "Commission's Exhibits 3245-A and 3245-B.").

33294 DEWEY T. MEYERS, being called as a witness for the Respondents and, being first duly sworn, testified as follows:

Direct Examination by Mr. Smith.

I am associated with Huron Portland Cement
33295 Company and I have been with them since March 15,
33296 1926. My first employment with them was as a clerk in the sales department, handling freight traffic matters. At present I am employed as traffic manager and I have held that position since about 1930. Prior to my

coming with Huron I had experience in traffic matters. In 1917 I was with the D.B.C. & W. Railroad, in the office of the general freight and passenger agent and general superintendent. Then I went into the traffic department of the Michigan Central, in the branch known as the Tariff Bureau. At the time I left the Michigan Central to come to Huron, I was assistant chief clerk of the Tariff Bureau.

33297 In the Tariff Bureau I acted to a certain degree as a general utility man for the traffic department. I handled freight tariff compilations, supervised tariff compilations, and also handled percentages and divisions of rates. In addition I assisted the purchasing agent of the Michigan Central in determining the best practice to be pursued in making purchases of various commodities. I had experience in connection with proceedings before the Interstate Commerce Commission and State Commissions and assisted in one way or another in commerce work during the entire period that I was in the Tariff Bureau. At the present time I am chairman of the Freight Tariff Simplification Committee of the Great Lakes Regional Advisory Board, which is a board under the sponsorship of the Association of American Railroads, consisting of a great many shippers of all sorts of commodities.

33298 Our traffic department operates as an adjunct to the sales department, and I am under the direct supervision of the vice president and general sales manager, which brings some sales work into the traffic work. I check all the freight rates, furnish the freight rates to the accounting department and to the salesmen. There are various other traffic duties that come in the regular course of business. I check the freight bills when necessary. I have something to do with the arrangements of Huron as to truck transportation in connection with the freight rate.

Q. Can you describe for us the facilities of your office, from which you derive your information as to freight rates?

A. I have a tariff file of somewhere between 175 and 200 freight tariffs issued by the various railroads and their agents, from which all types of freight rate information and railroad services are taken.

Q. You say 175 tariffs. What do they cover?

A. Generally speaking, they cover freight rates, switch-

ing charges, and special services of the carriers in Western Trunk Line Territory, Central Freight Association Territory, Illinois Freight Association Territory, Eastern Trunk Line Association Territory, and New England Freight Association Territory.

33299 Q. Now, tell us over what States the Huron does business.

A. We could start with the New England States; New York; western part of Pennsylvania; all of Ohio; about one-half of Indiana; all of Michigan; all of Wisconsin; occasionally Iowa; Minnesota; North and South Dakota, and Montana.

Q. You said Michigan, the north and—

A. Michigan up and down.

Q. Michigan up and down. And these tariffs cover that territory, do they?

A. They do, except when it is necessary to use a transcontinental freight tariff, I go over to the Great Northern office, or the Northern Pacific, in Detroit, and use their issues in their office.

Q. Have you had in your possession at any time a so-called Cement Institute freight rate book?

A. At one time I had one copy only of some of the States in which we operated. That is, I had New York, one copy of Pennsylvania, I think, one of Ohio, Indiana, Michigan up and down, Wisconsin, Minnesota, North and South Dakota. I did have one copy each of those freight books.

Q. Now, you have at the present time how many subsidiary plants scattered around the Lakes?

A. Eleven.

Q. There is eleven outside of Alpena?

A. That's right.

33300 Q. When this case started in the fall of 1937, how many did you have?

A. I think ten; I am not sure.

Q. Green Bay has been added?

A. Green Bay has been added.

Q. That is, added since.

Have copies of the Institute book ever been lodged with the managers of the subsidiary plants?

A. No. As I stated, the company, as a whole, had but one copy, and I had that in my office.

Q. Yes.

Now, of what use, if any,—or if you have not made any use, so states,—what use, if any, have you made or did you make of the Institute freight book?

A. We used it very little, and never to determine the price.

Q. And in what way did you use it?

A. Well, those books were compiled by States. The stations were in alphabetical order, and when I re-issued our own rate books I have used their alphabetical list of stations. At the time when Leland revised his open and prepaid list, so that the destinations were listed by States in alphabetical order, I discontinued using the Institute books for that part.

Q. Leland is the railroad tariff?

A. Leland is a railroad tariff on file with the Commission.

Q. Well, then, did you make your own compilation of rates?

33301 A. Yes.

Q. And from what source, exclusively, did you make it?

A. From the railroad tariffs.

Q. Maybe I am not clear. This compilation of rates that you made, in what shape was that?

A. Well, I would have to start with the checking freight rates in order to illustrate that, in this fashion here (referring to book of handwritten work sheets or work sheets).

Here, for instance, is a geographical list of stations covering the Lower Peninsula of Michigan. It was necessary to—going back just a little further—some of the freight tariffs, the freight rates are named with the destinations in geographical order; others the freight rates are named in alphabetical order.

Incidentally, I was the originator of the tariff of the Michigan Central. That is the hardest for me to interpret at this time now, since leaving there. I made it in alphabetical order, and I wish I had not.

Then those rates must be all checked in, into geographical order, and then transposed into alphabetical order, so that the books could be compiled for easy use by the salespeople.

Q. Now, this book that you speak of there, is that a sample book in the form with some of the sheets as you

prepared from your railroad tariffs (referring to black covered book)?

33302 A. Yes, this is the ultimate form that the rates go to our sales people.

Q. Yes.

By Mr. Smith:

Q. This paper I show you, Respondents' Exhibit 2380, is a typical page from a rate book (indicating). I see it is headed "Michigan L. P.," that is Lower Peninsula.

33303 A. Right.

Q. 1938.

A. Right.

Q. But would that be typical of those that were used before 1938?

A. Yes.

Q. That shows what, in the first column?

A. It shows the destinations in alphabetical order.

Q. And then the next column what?

A. Are the freight rates in cents per barrel from Alpena.

Q. Then the next? That is marked "Alp."—is it abbreviated?

A. That is right.

"Wyn."—Wyandotte; freight rates from Wyandotte to those destinations in cents per barrel.

Q. And the next one.

A. "SBC."

Q. What is that one?

A. That is Saginaw-Bay City.

I might explain there, if I may, that there are no specific commodity rates published from Saginaw, and we designated it in that fashion because the freight rates are based under the intermediate clause as applying from Bay City.

Q. What is the next column?

A. "MUSK"—the rates from Muskegon in cents per barrel.

Q. And the final one.

33304 A. "BUF"—for Buffington, in cents per barrel.

Q. Now, is that book made up of sheets like that completing the alphabetical list of all the stations which you made up from your tariffs and furnished to your salesmen traveling Michigan?

A. That's right.

Q. I notice you have "Muskegon" on there. Can you

recall that when you checked in your rate from Muskegon there was any such rates in the Institute freight rate book?

A. There were no such rates in the Institute rate book when I checked in those rates. The first check that we made of our Muskegon rates was in September, 1934. Later I checked them again. We issued quotations using the freight rates from Muskegon. If I recall correctly, it was November 16, 1935. Those quotations were issued and mailed that day; that is, November 16th; that meant they were in the hands of the trade in western Michigan November 17 or 18—at the latest the 18th. As I recall, the 16th was a Saturday. Therefore, the latest that the trade got our quotations was November 18th.

On November 20th we received an amendment to The Cement Institute rate book for Michigan dated at Chicago, November 18. In other words, we received the amendment to The Cement Institute rate book four days after we had issued the prices.

Q. In your quotation.

33305 A. In our quotations.

Q. Well, there was an illustration, then, I take it, of the use of constructive checking in of rates and use of rates without their being in the Institute rate book?

A. Correct.

Q. Did you find illustrations or examples, when you checked your result, of your examination of your tariffs, and the setting up of the rates which you set up, with this book that you say—and when you checked that with the Institute rate book did you ever find errors in the Institute rate book, or variations?

A. As I said, I did not check—that is, use the In-

33306 stitute books a great deal. At times there were cases where a freight rate would come to my attention by reason of some kind of a report from the field, where it would appear the competitors were using something different than what we were. I immediately rechecked my rates by the use of railroad tariffs. If I found that the rate as shown in our rate book still jibed with the railroad tariff, then I did look and see what The Cement Institute had in their book, because I had it—it was just another interpretation of the rate.

I might explain right here, that as far as the Institute rate books are concerned—any rate in the Institute rate book, in my opinion, was just one man's idea of the rate.

Q. Well, in such case where you found a variation between the Institute book and yours, did you continue to use yours, or did you change and use the Institute rate?

A. I never changed our books to use the Institute rate; I did change them from the railroad tariffs.

Trial Examiner Norwood: But he asked you as to your use, in the pricing.

The Witness: I beg your pardon?

Trial Examiner Norwood: He asked you as to your use, in making the prices where you find a difference between your rates and the Institute.

By Mr. Smith:

Q. And the Institute, which would you use?

33307 Trial Examiner Norwood: Which would you use in the pricing?

The Witness: I used the rate in our book.

By Mr. Smith:

Q. Going back just a moment: You said that they never sent these around to your different points. In your Duluth operations who handled your operation up there?

A. Cutler Magner Company, our Northwestern sales representatives.

Q. Who makes the prices up at Duluth?

A. They make all of them for the northern half of Wisconsin, all of Minnesota, North and South Dakota, Montana, if any.

Q. Do they ever have the Institute rate book up there?

A. No.

Q. In your files, Mr. Meyers, your tariff files, did you have any information as to land-grant rates?

A. Not in the tariff file.

Q. No, but in your file.

A. Yes.

Q. How much of that information did you have?

A. Well, I had enough to make a file on.

Q. What does that mean? Did you have information so that you knew the land-grant rate in your territory?

A. Oh, yes. My experience with the Michigan Central had taught me a lot about freight rates. It taught

33308 me a lot about divisions of freight rates, and I knew something about how the land-grant rates were settled ultimately; so I was in somewhat of a position, owing to my previous experience, to calculate, at least

suitable for our purposes, a land-grant that would somewhere nearly approximate any figure that might be used ultimately.

Q. Well, take your territory now. Does your file, or does it not, include information that advises you of the land grant rates that are applicable in the territory over which you do business?

A. Here is a telegram—

Q. No, no, just listen to the question and let us see if we can get you to answer the question.

Mr. MacIntyre: Do you want it read?

Mr. Smith: Yes.

Trial Examiner Norwood: Read the question.

(Question read by Reporter.)

A. Yes; to some extent.

Q. Well, what I am trying to get at is how much you know as to the land-grant rates in your territory. Can you compute them if occasion arises?

A. I can compute them quite closely; that is, compared to ultimate figure that might be used by anyone.

Q. Have you the copies of the division sheets put out by the Government?

33309 A. I have the circulars which the Government has put out for the land grant percentages.

Trial Examiner Norwood: Has the Government been putting those out for any length of time?

The Witness: I have had mine for quite a long time—over a period of years.

By Mr. Smith:

Q. Now, Mr. Meyers, let us go back to the time that you came with the Huron Company. Can you tell us what the practice of the Huron was at that time, as to whether it sold its cement at delivered prices or at f.o.b. plant prices?

A. Well, let us take cars first. We were selling on delivered price, using carloads, and in connection with truck loads we had a plant price, with a certain amount of compensation allowed for trucking to the customer.

Q. Well, where did the customer with his trucks take his delivery?

A. The customer's truck would come to our plant for cement, and where he went with it, of course, we didn't know.

Mr. MacIntyre: Can we have the time fixed on this?

Mr. Smith: Yes; I will get to that.

By Mr. Smith:

Q. You said you made an allowance. Be a little more particular about that.

A. Well, the shipment was invoiced at carload 33310 price, f.o.b. the plant, and outside of the switching district a customer was allowed the rail rate for trucking, and inside the switching district, at Detroit particularly, I think it was 10 cents a barrel.

Q. What period is it that you are talking about now?

A. Oh, I would say that extends from 1926 up to May 25, 1931.

Q. You think you have described the general practice accurately there, for that period?

A. Generally, yes. I don't remember any deviations, particularly.

Q. You mentioned the date of May 25, 1931. What is significant about that?

A. That is the date on which we made plant prices for truck delivery at Milwaukee, Toledo, Cleveland, Buffalo, I believe, and Detroit.

Q. Have you any document that demonstrates the existence of the change in that practice, or the existence of it at that time?

A. Yes, I have (producing a paper).

Mr. Smith: Will you mark this for identification?

(The document was marked for identification "Respondents' Exhibit 2381-A and 2381-B.")

Mr. Smith: I do not recall that I formally offered Exhibit 2380, but I do now.

33311 Trial Examiner Norwood: Show it to Counsel.

(The document was handed to Counsel for Commission.)

Mr. Wooden: No objection.

Trial Examiner Norwood: It will be received and marked Respondents' Exhibit 2380.

(RESP. EX. 2380 was offered and received in evidence.)

By Mr. Smith:

Q. Referring to this paper, marked Respondents' Exhibit 2381, for identification, just tell us the story about that, Mr. Meyers. Where did that come from?

A. That was one of the forms—

Q. Where did it come from—your file or somebody else's file?

A. Yes; it came from my file.

Q. Now, tell us what it is.

A. That is the quotation form used by Huron in 1931, when they mailed quotations to the trade giving them a price f.o.b.

Q. No; do not tell us what is in it. I notice a typewritten address on it. How does that come to be in there?

A. That is the way it came to me from the sales manager, as a sample for me to follow in getting out the quotations.

Q. I see; and those typewritten prices in there were samples in the same way; is that true?

33312 A. That is true.

Q. What did you do when you got that?

A. We issued quotations to the trade, using this form.

Mr. Smith: I offer Respondents' Exhibit 2381-A and B, for identification, into evidence (handing document to Counsel for the Commission).

Mr. MacIntyre: I would like to ask a question of the witness in regard to this.

Trial Examiner Norwood: All right.

Examination on Voir Dire by Mr. MacIntyre.

Q. Mr. Meyers, you have stated the address was typed in when you got this. Do you know whether or not the price that appears on this exhibit 2381 was also typed in at the same time?

A. Yes; it came to me with that price typed in.

Q. Do you know whether or not, from the checking that you have done, that that was the price that was actually quoted at that destination as of that time?

A. I couldn't say without checking.

Q. Well, have you ascertained at all to determine whether or not that is the fact?

Mr. Smith: You can check it.

The Witness: I can check it, yes, sure.

Mr. MacIntyre: We would like that to be done

33313 so that we may determine whether or not this may be taken as an example of what occurred with respect to the issuance of quotations to that destination as

of that date. With that understanding, we raise no objection.

Mr. Smith: That will emerge later in our testimony.

Trial Examiner Norwood: Yes. We will see.

Mr. Smith: For the present, we are concerned with something else about this exhibit.

Trial Examiner Norwood: It is received, and will be marked.

(RESP. EX. 2381-A and 2381-B was offered and received in evidence.)

By Mr. Smith:

Q. What is the language in that Exhibit 238-A and B, Mr. Meyers, that you refer to when you say that these quotations offered an f.o.b. plant price? Will you read that language?

A. In the body of the quotation we have two prices. One reads:

"F.o.b. cars your station in carload lots,—in cloth sacks," so much per barrel, and "including sacks"; in paper bags 25 cents per barrel less.

The next part reads:

"F.o.b. trucking platform, our nearest plant,—
33314 In cloth sacks," so much per barrel, "including sacks. In paper bags 25 cents per barrel less."

Q. That quotation there was made to a dealer where? That is, it is addressed to a dealer where?

A. At Birmingham, Mich.

Q. So that if those figures are correct, what would be the differential between the f.o.b. cars at Birmingham and f.o.b. the trucking platform of your nearest plant?

A. Assuming these are the figures, this $1.89 f.o.b. cars and $1:60 f.o.b. plant, the difference is 29 cents per barrel.

Trial Examiner Norwood: Does that represent the freight from your plant to Birmingham?

The Witness: That is the rail rate from Detroit to Birmingham, with, of course, the fractions disposed.

Trial Examiner Norwood: And that quotation is for delivery to his trucks?

The Witness: Yes.

By Mr. Smith:

Q. Now, you say you issued quotations, using that as a form. Is that what you meant?

A. That is right.

Q. You issued quotations over what territory, or where?

A. I don't recall just what the limits were at the time, but Birmingham is some distance from Detroit, and I know it went beyond Pontiac, to Mr. Clements, and
33315 I believe Ann Arbor and other towns surrounding Detroit. As I say, I do not recall the distance, but I think it is around 40 miles, probably.

Q. Those figures, then, would be different than the other quotations?

A. Yes, sir; they would vary.

Q. In other words, you adopted that general form—if Counsel will permit me—for an area surrounding Detroit that could be serviced by trucks, but the prices would be different to the different destinations.

A. That is true in connection with the delivered on cars. The plant prices remained stationary.

Trial Examiner Norwood: The plant prices are stationary, and that is the same to Birmingham as to Ann Arbor?

The Witness: Yes.

Trial Examiner Norwood: And Battle Creek?

The Witness: I don't think we send it to Battle Creek. That would be too far.

Trial Examiner Norwood: Well, I will say Lansing.

The Witness: Probably not even Lansing, at that time.

By Mr. Smith:

Q. Lansing is about how far away?

A. Oh; about 75 miles.

Trial Examiner Norwood: The plant rate would
33316 be for any one within 40 miles; is that correct?

The Witness: I don't recall the exact radius but it probably was close to 40 miles.

By Mr. Smith:

Q. Now, what was the date that you sent those out?

A. May 25, 1931.

Q. How long, if at all, did you continue to make quotations similar in principle to that which I take it to be fairly interpreted as optional, f.o.b. rail delivery at destination as one option, and the other f.o.b. loading station at your nearest plant? How long did you continue that practice, if at all?

A. It was continued until—may I refer to my record here?

Q. Certainly.

A. March 10, 1933.

Mr. MacIntyre: May we have the paper marked that he refers to in that instance, for that date?

By Mr. Smith:

Q. Well, now, Mr. Witness, what was that date, March 10, 1933?

A. Yes.

33317 Q. Can you give us any more illustrations of occasions, or locations, both, place and date, as nearly as you can, of where the Huron Company has made f.o.b. plant prices?

A. In a circle around Milwaukee at the same time; in a circle around Toledo and Cleveland at the same time.

Q. And did the practice then extend over the same period and stop about the same time, or what are the facts about that?

A. Well, they stopped at various times. Not—it was done in Michigan on March 10, 1933, in the Lower Peninsula.

Q. Now, you said Milwaukee, Toledo, Cleveland.

A. Yes.

Q. Any other place?

A. Possibly Buffalo.

Q. I see. Why do you say "possibly Buffalo"?

A. Because I am not sure.

Q. I see. Well, now, let us pass from that particular form of a mill price, or f.o.b. plant price, to other illustrations, if there are any, of where you have sold cement f.o.b. any one of your plants. Let us get a brief statement of those in the record, if we can.

A. The railroads; Government.

Q. Well, what Government?

A. United States Government.

Q. At what jobs, if any?

A. Well, I usually think of Ft. Peck when I think
33318 of a plant price.

Q. Is that one of them?

A. That is one of them.

Q. And that occurred in what year?

A. The year of 1935.

Q. 1935, yes.
A. Or 1936.
Q. Any other sales to the Government anywhere else, at plant prices?
A. Yes. We have sold them at—on purchases they have made for Ft. Brady at the Soo. We gave them plant price at Alpena.
Q. Any other?
A. Well, I don't just recall now; but there are—
Q. Mr. Crapo spoke in his testimony of the lighthouse service; do you know anything about that?
A. Yes, we gave the lighthouse service plant price at both Alpena and Detroit.
Q. And how about the W.P.A. Procurement at Cleveland?
A. We did it there.
Q. How extensively? How much business did you do with the Government there on those bids?
A. Quite a bit.
Q. Well, I know; what does that mean? A hundred barrels?
A. No, it was thousands of barrels.
Q. What about the Good Friday bids, did you sell any on them?
33319 A. We didn't sell any on them.
Q. Did you bid on them?
A. We bid on them.
Q. Which did you bid, at plant or delivered prices?
A. Plant.
Q. I see.
How about your Cleveland dealers, do you sell them on plant or destination?
A. We have been doing that at Cleveland off and on for years, giving them plant price.
Q. Did that exist before July, 1937?
A. Yes, it was done at Cleveland before that, at various times.
Q. And how about since that time, has it continued?
A. Yes, it has.
Q. Up to when?
A. Today.
Q. I see.

33320 Washington, D. C.,
Wednesday, February 28, 1940.

33321 DEWEY T. MEYERS thereupon resumed the stand and testified further as follows:

33322 Mr. Smith: On page 33293, the middle of the page, I said: "something like 95 percent of our production is distributed by trucks." I misspoke myself. That is true as to Detroit, but the average is 75 percent, and I should have said 75 percent.

By Mr. Smith:

Q. Mr. Meyers, turning to your testimony yesterday, you testified about checking in rates from Muskegon.

Mr. Smith: Mark that for identification, please.

(A map was marked for identification "Respondents' Exhibit 2382.")

By Mr. Smith:

Q. When you made that computation of rates, did you record it in any particular manner?

A. Yes. The tariffs published the rates in alphabetical order, and it was necessary in order to correctly interpret the tariffs to outline the rates on a map.

Q. Is this paper marked Respondents' Exhibit
33323 2382 the map which you made at that time (handing the paper to the witness)?

A. Yes, that is the map that I made the first time that I checked out the tariffs for rates from Muskegon.

Q. And these figures at the different points on the railroad, do they indicate the rates?

A. They indicate the rates converted into cents per barrel. You understand, the rates are published in cents per hundred pounds—

Q. Yes.

A. —and automatically in my mind as I check a tariff I convert the rate into cents per barrel.

Mr. Smith: I offer that (handing the map to Commission's Counsel).

Mr. MacIntyre: I would like to ask the witness a question on voir dire.

Trial Examiner Norwood: Yes.

Examination on Your Direct by Mr. MacIntyre

Q. These rates that are shown, I understand you to say, are rates from Muskegon to various points in terms of cents per barrel?

A. Right.

Q. For rail or truck?

A. For rail.

Q. They are the official tariff rates in terms of
33324 cents per barrel by railroad delivery from Muskegon to those points?

A. Yes. As I said, the rates are named in the tariffs in cents per hundred pounds, and I have converted them to rates per barrel, of course disposing of fractions.

Q. As of what date did you select those rates from the tariff for this map?

A. The exhibit shows September 20, 1934.

Q. September 20, 1934?

A. That is when I completed the job.

33325 (RESP. EX. 2382 was offered and received in evidence.)

By Mr. Smith:

Q. Again turning to your testimony yesterday, you made a statement, I think, about the f.o.b. plant prices in Duluth. I want to get that a little more in detail.

Mr. Smith: Mark this.

(The document was marked for identification "Respondents' Exhibit 2383.")

By Mr. Smith:

Q. Did you make a particular investigation with the Duluth prices?

A. I made a study of them right after the time the complaint was filed.

Q. Is this Respondents' Exhibit, for identification, 2383 that study (handing document to witness)?

A. Yes.

Q. Does it bear any date, so that you can identify when you made it?

A. I made it on July 25, 1937.

Q. Does that purport to contain any recital of the situation as to rates in Duluth from some date previous to that?

A. Yes.

33326 Q. Back to what date?

A. December 9, 1933.

Q. Well, what is this (pointing to data on Respondents' Exhibit 2383)?

A. A period that is covered, starts with January 1, 1933.

Q. Yes. And it shows, does it, the prices, and whether delivered or f.o.b., down to the date of the document?

A. That's right.

Q. But there had been no change, had there, after December 9?

A. No, the last change recorded here is December 9, 1933.

Q. Yes.

A. And that remained in effect until that time.

Q. Refreshing your recollection from that, can you tell us what f.o.b. mill prices were in effect in Duluth during that period, and give us the period at which any particular price you cite was in effect?

A. Well, we had a plant price for trucks on September 1933. On that same date we were making a price f.o.b. the railroad depot for l.c.l. shipments.

Q. Was there any differential in the price between the f.o.b. plant price for trucks, and the price for rail delivery?

A. Yes, there was.

Q. I see. Go ahead with any other plant prices

33327 there (referring to Respondents' Exhibit 2383).

A. On December 9, 1933, we had a plant price for delivery f.o.b. scows at the Duluth plant; also f.o.b. plant for dealers' trucks.

Q. Yes. Now, were either, or were both of those prices any different than what appeared on rail deliveries?

A. They were lower than on the rail deliveries.

Q. So there was a differential between your plant prices and your delivered prices in each instance?

A. That's right.

Q. Do those prices there— Notice the note on the bottom. —are they in effect at the present time, or what is the situation up to the present time (referring to Respondents' Exhibit 2383)?

A. They still have the plant prices in Duluth.

Q. Yes.

Mr. Smith: This is Respondents' Exhibit, for identifica-

tion, 2383, and I offer that in evidence (handing document to Mr. MacIntyre).

Will you mark this for identification, please.

Trial Examiner Norwood: It may be marked.

(A bound volume was marked for identification "Respondents' Exhibit 2384.")

Trial Examiner Norwood: Are you showing that actual sales were made on these prices here?

33328 Mr. MacIntyre: I would like to ask the witness a question on that, if I may, Your Honor.

Trial Examiner Norwood: Go ahead.

Examination on Voir Dire by Mr. MacIntyre.

Q. Mr. Meyers, referring to Respondents' Exhibit, for identification, 2383, what caused you to make that up after the complaint in this case had been issued?

A. I believe that I read in the complaint that there was an allegation that plant prices were not being offered, or words to that effect.

Q. Did you make it up of your own responsibility, or did someone suggest that you make up such a document?

A. I may have conferred with my superior, before I did it.

Q. And who was that?

A. Mr. Rooney.

Q. Did he suggest that you do it with a view that it might be useful in this case in connection with the proceeding in this case?

A. I don't know as he suggested it.

Q. Well, what do you recall was suggested in that connection?

A. May I make a little statement right here, Mr. MacIntyre, if you please?

I have done a lot of commerce work with the rail-
33329 roads. I am a practitioner before the I.C.C., and I knew that we would have to have some information relative to this case, and, therefore, I went ahead and prepared a lot of memoranda and figures which might be used in the case.

Q. In that connection, you discussed the making of this document up with Mr. Rooney?

A. I assume that I did. I cannot say definitely.

Q. Well, what is your recollection on it,—that is, your best recollection?

A. I talked with Mr. Regney quite a bit about the case, naturally.

Q. And about making up this document, in that connection?

A. I wouldn't be a bit surprised.

Q. Well, what is your recollection on it? We want to get it as close as we can to the facts.

A. I did so many things about that time that I can't recall whether I talked with him or not, regarding this one particular incident, or paper.

Q. Well, now, what about the documents from which this was made up? What documents were those?

A. I don't know whether I got that from the Duluth manifests or directly from our sales agents in Duluth; I am not sure.

Q. That is, you don't know whether you secured this information from Cutler Magner, dealer or distributor in building materials in Duluth, or from some other source?

A. No, I don't know now.

Q. But from whatever source that was, it was a matter of record at the time?

A. Yes, it was.

Q. Rather than from a matter of your recollection of your experiences?

(Witness makes no response.)

Q. Is that a fair statement?

A. I would like to have that question again.

Trial Examiner Norwood: Read it.

(Last two questions read by Reporter.)

A. All contracts that were executed by Cutler Magner in our behalf pass over my desk. I go over the prices that they put on the contracts.

Q. But could you have, from your experience of those passing over your desk, made up this document from your recollection of what they contained?

A. Probably not. I would have to refer to some records to get this.

Q. And you don't know what you referred to, then, whether they were in the offices of Cutler Magner Company, or just where?

A. No.

33331 Direct Examination by Mr. Smith (Continued).

Q. Mr. Witness, have you satisfied yourself, after you refreshed your memory from this document, that the statements in there as to these prices, and the method in which they are made, are exact?

A. Yes.

33333 Q. Now, as to the prices, that would appear on those invoices, wouldn't it, Mr. Meyers?

A. Yes.

Q. So that the information of prices you got from the original records that went across your desk as to the sales up there?

33334 A. In so far as—

Q. Just answer "yes" or "no."

A. Yes.

Mr. MacIntyre: But, if Your Honor please, the voir dire examination has disclosed from the witness that he does not have any independent recollection of the terms and conditions of those invoices so as to determine from his present testimony whether or not his interpretation of all of those, as is shown on Respondents' Exhibit 2383, is absolutely correct, and without those we could not cross-examine him in an effort to determine his interpretation there as to its correctness.

Trial Examiner Norwood: I think you will have to put in the basic facts from which that paper is made.

Mr. Smith: I hope Your Honor understands that I do not agree that this witness has not any independent recollection. That is a gratuitous statement of Counsel.

Trial Examiner Norwood: Well, I do not think—

Mr. Smith: He has refreshed his recollection, but he has a recollection.

Trial Examiner Norwood: It could not fairly be received in the absence of the basic data.

33335 Q. Independent of that exhibit, Mr. Meyers, can you state from your own knowledge whether or not f.o.b. plant prices were made—had been in Duluth, and are being made at the present time?

A. Yes.

Q. Now, one other matter before we go ahead.

I am showing the witness Respondents' Exhibit 2384, and ask him what that is (handing the exhibit to the witness).

A. Exhibit 2384 is a circular which I compiled showing the zone numbers for all destinations in the Lower Peninsula of Michigan from Huron's plants used in connection with determining truck freight rates.

Q. What is the date of the circular?

A. December 15, 1937.

Q. How long prior to that time had you been at work preparing it?

A. Probably a year.

Q. So it was not prepared for the purposes of this case?

A. It was prepared in spare time, oh, at least—for at least a year.

Q. For what purpose?

A. To facilitate the checking of truck rates in Michigan from our plants.

33336. Q. Now, I notice on the first page you give each county in number; is that it?

A. Yes; each county has a number.

Q. What is the significance of the use of the word "zone"? What are zones in that connection?

A. Truck rates in Michigan are built up on a zone mileage block system; that is, in 10-mile blocks. Circles described on a map issued by the Michigan Public Utilities Commission, and the rates are predicated upon those 10-mile blocks, or circles.

Q. That is, each block or circle is a zone?

A. Each one is a zone.

Q. And when it says that Abbott is in County 37, is in the eighth zone for Detroit, that means that it lies within the zone—what, 70 and 80 or 80 and 90 miles, or what?

A. Seventy and eighty.

Q. For whose use was this prepared?

A. For Huron employees, and it was also furnished to the trucking companies.

Q. At that time were truck rates in any way filed with the Public Authority in Michigan?

A. Yes.

Q. Just briefly state how that is done.

A. Under the Michigan law it is required that all contract carriers file their rates, file their minimum

33337 rates with the Michigan Public Utilities Commission.

Q. How about the contract? Do they have to file them?

A. I believe they do.

Q. Then they get what from the Commission?

A. They get a permit—they have a permit to operate—

Q. I see.

A. —as a contract carrier.

Q. I see.

Can they operate as a contract carrier without that permit and without that filing?

A. No.

Q. Am I correct that with this book, and reference to the public filed tariffs, or schedules of rates, whatever you call them, would give information as to the truck rate to the point named?

A. Yes.

Mr. Smith: That is offered (handing the document to Commission's Counsel).

By Mr. Smith:

Q. That information remains as good today as it was then, is it?

A. Yes.

Q. But the rates applicable to those zones, you would have to go to the Public Utility Commission, just as you would to a railroad tariff to find out what rate applied today?

33338 A. Not necessarily to the Utilities Commission, but you could find it on file with the Utilities Commission.

Q. I know, but if I wanted to know what was the truck charge to Addison, this book, if I got access to it, would tell me the zone it was in; then I would have to go to the Commission to get the applicable rate?

A. Yes.

Q. But once having done that, I would find a rate there that was a binding legal rate, just as the tariff rate on a railroad?

A. Yes.

Q. Nothing uncertain about it?

A. No.

Mr. Smith: That is all.

Mr. MacIntyre: I would like to ask a question on voir dire on this, if I may.

Trial Examiner Norwood: Go ahead.

Examination on Voir Dire by Mr. MacIntyre.

Q. Over what period have the rates shown on this Respondents' Exhibit 2384 been effective, Mr. Meyers?

Mr. Smith: There are no rates in that, Mr. MacIntyre.

Mr. MacIntyre: Well, the rates to which this makes reference.

33339 Mr. Smith: Well, I think the Counsel did not hear the last questions I asked the witness.

If I may explain, the rates from time to time of each contract carrier are filed with the Commission. They are filed in zones. This gives the information as to what zone the town is in. When he has found that zone, he can go up to the Commission and look at the tariff and find the applicable rate.

Mr. MacIntyre: This is merely a key so that he will know which one to ask for when he goes up?

Mr. Smith: That is right.

By Mr. MacIntyre:

Q. And how long have you been using in your company such a document, Mr. Meyers, as 2384?

A. The document, itself, has been used since December 15, 1937.

Q. This says "circular"—it has a note on the front "Traffic Circular No. 1." That indicates that it is the first one of its kind that your company had produced for its use?

A. Yes. I had to call it something.

33340 Trial Examiner Norwood: How long has that condition obtained in Michigan, Mr. Meyers?

By Mr. Smith:

Q. How long have you been required to file truck rates?

A. I do not remember the exact date of the law, but I think it is along about '33.

Q. That is also true, is it, Mr. Meyers, as to the other States in which you do business, the law went into effect at about that time?

33341 A. Yes; roughly from '32 to '34.

Trial Examiner Norwood: I shall sustain the objection to the proffer there of Respondents' 2384, for identification.

By Mr. Smith:

Q. Now, Mr. Meyers, can you describe to us the practice or policy of your company with reference to diversion of rail shipments or reconsignment of rail shipments of cement? Have you had any experience with that?

A. I do not know that we have had any particular complaints that would—

Q. Well, let us be a little more definite.

Do you recall any complaint by anyone as to consenting to divert or permission to divert rail shipments?

A. No.

Q. What, if anything, has your company done about it?

A. In New York State we have a rubber stamp that we put on the bill of lading which reads substantially that no reconsignment or diversion shall be made without the authorization by the consignor.

Q. Have you ever had a request in New York for diversion or reconsignment, in your memory?

A. Not that I can recall.

Q. Do you use that rubber stamp in any other State?

A. No. Our Cleveland plant has that rubber 33342 stamp, but they have never used it.

Q. Then, neither in New York nor in any other States have you had requests for diverison or reconsignment?

A. Not that I can recall.

Q. Can you state whether or not it ever came to your knowledge that any dealer or purchaser has diverted any rail shipment of cement to another destination from that to which you originally billed it?

A. It has not come to my direct attention, no.

Trial Examiner Norwood: Are you the officer to whose attention those matters would come in the due course of business?

The Witness: Yes.

By Mr. Smith:

Q. And to your knowledge has there ever come to you any information that there has been such a diversion, with or without consent, of rail shipments?

A. No.

Q. Now, when it comes to truck shipments, what is the situation as to the diversion of truck shipments? Is the same situation there, or not? What is it?

A. Well, that is quite a bit different. When we were on plant price for trucks we were considerably bothered by diversions of truck shipments.

Q. Now, let us see. Can you recall any specific
33343 instance of that, for instance, in Detroit?

A. Yes. There was that fellow up there in Royal Oak—I mean—

Q. What is his name?

A. —Hazel Park.

John R. Fuel & Supply Company.

Q. What did he do?

A. Peddled cement all over Detroit.

Q. That is not definite. Just what did he do?

A. He came in to our plant with his trucks for the purpose of stating that the destination of his load would be Hazel Park.

Q. Where is Hazel Park in reference to Detroit?

A. It is north of Detoit.

Q. How far?

A. Oh—

Q. Just roughly.

A. Probably 15 miles from the City Hall.

Q. You were then selling on plant prices for trucks?

A. Yes.

Q. Now, then, what did he do when he got the truck shipment?

A. Delivered it to jobs in Detroit.

Q. Did that occur in any other point in your territory?

A. Yes. There is a similar case. That dealer at Hale's Corners, Wis., who was doing practically the same thing in connection with Milwaukee.

33344 Q. Anything in Cleveland?

A. Yes. There were some complaints of that kind from Cleveland dealers, as I recall.

Q. Well, now, you speak of complaints from Cleveland dealers. What did the dealer in Detroit, for instance, say about that practice on the part of this man from Hazel Park?

Mr. MacIntyre: I object to further discussions as to what someone else said, unless further foundation is laid to show that it is not pure and rank hearsay that this man heard someone else in his organization say that the man had in turn said to them.

Trial Examiner Norwood: You want to show that the dealer protested because of this trucker?

Mr. Smith: Yes. Yes, Your Honor.

Mr. MacIntyre: Let us have the name of the dealer and the time and place where this conversation took place. This man is a traffic manager. Does he load at the platform? Did he hear the man, or what someone in his organization told him?

Trial Examiner Norwood: I think this witness may make a short-cut of this and tell us what investigations he made and the effects.

Mr. Smith: Yes.

Trial Examiner Norwood: Do you not think so?

By Mr. Smith:

33345 Q. Did you get that, Mr. Meyers?

A. Yes.

Your Honor—

Trial Examiner Norwood: I shall overrule the objection. Answer the question.

The Witness: Yes, Your Honor. We dropped the John R. Fuel & Supply Company.

Trial Examiner Norwood: As a customer.

By Mr. Smith:

Q. Is this or is that not a typical case—when you speak of the John R. Fuel & Supply Company, is that a typical case? Did the same results occur in the other territories?

A. Yes.

Q. Now, you said yesterday that in referring to these quotations that went out in 1931, as I recall, that the practice of giving f.o.b. prices, f.o.b. your truck at nearest plant, persisted for some time, until some time in May, as I remember, of 1933?

A. March 10, 1933.

Q. March 10, 1933?

A. Yes.

Q. I want to find out, if you can state it—and state it briefly and succinctly, and if you had any part in the decision—how you came to drop that practice on or about March 20, 1933.

33346 Did you participate in that decision?

A. Yes.

Q. And you feel that you are acquainted with the reasons on which the practice was changed?

A. Some of them, at least.

Q. Yes.

Now, will you tell us, if you can, what your view was of the reasons on which you made the change?

A. Well, in the first place, the operating department was not satisfied with their costs, with the type of equipment that was coming into the plant, and there was pressure from the operating department to go on a delivered basis, and there were objections by the dealers, the trade in general, to the plant price.

Q. What, in general, was the objection of the trade to the plant price?

Q. Did those objections come to you, or any of them?

A. They were discussed between me and Mr. Rooney.

Q. That is not quite the question. What knowl-
33347 edge have you of the objections that came from the trade?

A. Many orders are placed with me personally over the telephone, and I did get some reaction directly from dealers over the telephone.

Q. That is, when you say "reaction," you mean objections?—

A. Yes.

Q. —I assume?

A. Yes.

Q. Yes.

Mr. Smith: Well, I submit that he is qualified, now, to discuss the objections.

By Mr. Smith:

Q. What were these objections?

Trial Examiner Norwood: You refer to objections to this local competition caused by selling to truckers who would undersell them; is that right?

The Witness: I don't know, Your Honor, whether it was underselling, or not. It was the fact that the dealer in his own backyard was losing the business.

Trial Examiner Norwood: Well, he must have been losing ~~if by being~~ undersold, do you not think?

The Witness: Of course, I can't tell as to that. I don't know what their prices are.

By Mr. Smith:

Q. Well, could you lose the business without being undersold?

33348 A. Probably not.

There is one other little element that might enter into that; that might be friendship.

Q. What do you mean by that, Mr. Meyers? Please be a little more definite in your statements.

A. Well, suppose a dealer out in the sticks has got a contractor friend close by to the plant; he may use him as a facility for making purchases rather than patronizing the local dealer.

Q. Well, now, to get back to my question.

Your knowledge of the objections that came to you, what were the objections particularly of the dealer trade to the continuance of the plant prices?

A. One thing, as I remember, they wanted bigger loads; they wanted—they wanted to stop this practice of outside dealers peddling cement in their own towns.

Q. What was their preference, or did they express it to you at that time, as between f.o.b. plant or f.o.b. delivered prices on rail?

33349 I am diverting his attention now—

Trial Examiner Norwood: Yes.

Mr. Smith: —from the truck shipments to the rail shipments.

A. I can recall specifically the Ann Arbor Construction Company.

By Mr. Smith:

Q. Now, Mr. Meyers, if you would just listen to my question. I did not ask you what you recalled at that time.

A. Perhaps I haven't got it.

Q. Please answer my question.

33350 A. I recall the Ann Arbor Construction Company specifically expressing a preference for delivered prices.

Q. What reason did they give?

A. I don't believe they gave any.

Q. Well, did any of your customers state any reason why they wanted delivered prices?

A. I don't think so. They probably had their reasons, but they didn't want to tell me what they were.

Q. Well, now, referring to the rail shipments from the standpoint of your company, what did you determine was most desirable for the company as between making a delivered rail price, or an f.o.b. plant price?

A. We can serve the public much better with delivered prices than we ever could with plant prices.

33351 Trial Examiner Norwood: He was stating the considerations his company had in making this policy. He has a right to do that.

Mr. Smith: Yes.

Well, let us see if we cannot state those considerations, then.

By Mr. Smith:

Q. Start again, Mr. Meyers, and let us see.

Mr. Smith: You will appreciate, Your Honor, that we are charged here with having refused to give plant prices as the result of a combination.

Trial Examiner Norwood: Yes.

Mr. Smith: And I am endeavoring to show the factors that—

Trial Examiner Norwood (interposing): Entered into it.

Mr. Smith: At which we arrived at a contrary decision, to demonstrate that it was not the result of a combination, it was the logical result from our general

33352 situation.

Trial Examiner Norwood: Well, isn't the Counsel going into and developing the same reasons that have been given a dozen times before?

Mr. Smith: Well—

Trial Examiner Norwood: If the Counsel has anything new in the way of arguments against this thing which the trade considered in making that policy, which has been shown in evidence many times, that the dealers—some dealers; a substantial number of dealers—opposed trucking; and opposed being undersold in their own localities, and all that—

Mr. Smith (interposing): But, Your Honor, I hope Your Honor will appreciate that we accept none of the statements made by the rest of the industry. We are running our own company. I do not accept explanations on the part of any other company. We think we run ours differently.

Trial Examiner Norwood: If you have a different explanation, I think you can give that; but you have a right on the record there to adopt all this abundant testimony given in the great detail about these methods, and these

conditions, and these policies, and the reasons for the adoption of them.

Mr. Smith: Well, there are so many of the prac-
33353 tices which are in evidence as being a part of the industry, itself, that it would be more or less identical with; but so far as accepting their statements of their reasons—

Trial Examiner Norwood: Yes.

Mr. Smith: —I cannot do that. I feel that we have a right to make our own statement.

Trial Examiner Norwood: Well, I feel so, but I feel that you are wasting time.

Mr. Smith: I can clear this up.

Trial Examiner Norwood: I feel that you are wasting time if you are going to give the same reasons and same considerations that have been given dozens of times, and which you might easily adopt here under your right in this stipulation on page 342 of the record.

By Mr. Smith:

Q. Approximately how many rail stations are there in Michigan, for instance?

A. There are between 2,000 and 2,200 railroad stations in the State of Michigan.

33354 By Mr. Smith:

Q. As to how many of them is there a cement rail tariff located?

A. About thirty.

Q. Could a purchaser at one of the other stations—would he have available there the railroad rates on a shipment from a mill to him?

A. At the majority of the stations; that is, where the tariffs are not on file, no.

Q. What do you mean by "majority"? You said there were only thirty, where they were there.

A. That's right.

Q. And is it—

A. Outside of the thirty.

Q. Outside of the thirty, yes.

Is there any way—how would he go about it, then, to find out how much his cement was going to cost him at his place if he was taking it f.o.b. some mill?

A. He would have to get in touch with each and every

railroad agent in his town; each railroad agent would have to wire his division freight office—

33355 By Mr. Smith:

Q. Go ahead, Mr. Meyers.

A. The freight agent would have to get in touch with his division freight agent, or his general freight agent, for the rate, and then would have to come back to the agent. The agent would give it to the consignee, or the dealer customer. He, in turn, would have to figure out what that rate would be in cents per barrel, because he wouldn't get it in cents per barrel. He would get it in the unit of measure shown in the tariff, which ordinarily is rates in cents per 100 pounds.

Trial Examiner Norwood: Now, couldn't he just
33356 ask the salesman that sells him the cement what the freight rate would be there, and find out immediately?

The Witness: Well, if you had plant prices the salesman probably would not have to have rates. I don't know. I don't know what we would do in a case of that kind. Now, that is not where this man's troubles end, either.

By Mr. Smith:

Q. Go ahead.

A. He has to get that from these railroads in his town, and it may be different, all three may be different, and at that he may not get the lowest available freight rate in the town.

Q. Did you make a study of that part of the situation based on Canandaigua, N. Y., Mr. Meyers?

A. Yes, I made several studies.

Q. Well, I am asking you about Canandaigua. Have you got the Canandaigua one there?

(Witness searches his brief case.)

A. I have not.

Mr. Smith: I think we have it here, (referring to papers).

Will you mark this for identification, please.

Trial Examiner Norwood: It may be marked.

(A document was marked for identification "Respondents' Exhibit 2385.")

33357 By Mr. Smith:

Q. Is that the study you made to demonstrate the difficulty of the purchaser in New York buying f.o.b. plant (handing Respondents' Exhibit, for identification, 2385 to witness)? Is that the study?

A. That's the study.

Q. Yes.

A. That I made.

Q. Yes.

A. That is one of the studies I made in connection with Canandaigua.

Q. No, I am asking you if that is not the study.

A. Yes.

Q. Just answer my question and nothing else.

Can you epitomize that, as briefly as you can (handing Respondents' Exhibit 2385 to witness)?

A. This shows that there are four different freight rates from Oswego—

Trial Examiner Norwood: Now, do not tell us what the papers show until we find out whether or not the paper is admissible in evidence.

By Mr. Smith:

Q. Just epitomize it, and tell the story as nearly as you can from it.

33358 Q. Mr. Meyers, where did you get the information on this sheet (showing witness Respondents' Exhibit 2385, for identification)?

A. From the freight tariffs of the railroads.

Q. There is nothing on there except what is in the railroad tariffs, is there?

A. No.

Q. Well, now, maybe you have got a memory of what is in the tariffs without looking at the sheet. Tell us that.

A. I know that from Oswego to Canandaigua there are at least three different rates, via at least four different routes, and then there is a great spread in those rates.

From Buffalo to Canandaigua there are at least four different freight rates, with different routes, with a 33359 great spread between the low and the high.

Q. Yes. And between Buffalo and Canandaigua there are about how many railroad routes; that is, independent of whether rates are published over them or not, —about how many?

A. Well, you might move them over innumerable routes, different routes.

Q. Well, how many do you have scheduled on your paper there (showing to witness Respondents' Exhibit 2385)? Just count them.

A. Twelve.

Q. And how many from Oswego to Canandaigua?

A. Seven.

Q. Yes. And as I understand your testimony, the purchaser in Canandaigua would have to make his selection of those rates and find out which one he wanted to use?

A. Yes.

Q. Are there, to your knowledge, other destinations in your territory in which the same difficulty would arise if the purchaser bought f.o.b. plant?

A. Oh, yes.

Q. Many of them?

A. Yes.

Mr. Smith: I offer Respondents' Exhibit 2385 in evidence (handing to Mr. MacIntyre).

Mr. MacIntyre: I would like to ask the witness
33360 one question about this offer.

Examination on Voir Dire by Mr. MacIntyre.

Q. When was this document, Respondents' Exhibit 2385, for identification, made up?

A. Recently.

Q. How recently?

A. Not long ago.

Q. Well—

A. Middle of February, probably.

Q. About the middle of February?

A. Yes.

Q. And for what purpose?

A. For use in this case.

33361 Q. Now, again referring to this Respondents' Exhibit 2385, for identification, you made it up for the purpose of showing—or you attempted to show by it, do I understand, the difficulties that are encountered by a dealer in that town in securing freight rate information?

A. Yes.

Q. Is that what you made it up for?

A. Yes.

Q. Did you, in connection with your survey in making that up, discuss those difficulties with the dealers in that town to know whether or not they knew those freight rates that you have listed with reference to tariffs on this document?

A. No.

Q. You don't know but what they knew all of them, then?

A. That's right.

33362 Trial Examiner Norwood: Well, I think that on this particular point here he might illustrate it with the paper.

I shall receive Respondents' Exhibit 2385. You may cross-examine him on it.

(RESP. EX. 2385 was offered and received in evidence.)

33363 By Mr. Smith:

Q. Were there any other considerations, Mr. Meyers, that affected your judgment as to your decision to go back to delivered prices, if you recall?

A. Yes.

Q. What were they? Give us one of them.

A. Some time ago I made a study of the shipments that move from our Cleveland plant into the Muskingum Valley, more out of curiosity on my own part, to see how much money we saved the Government by selling on a delivered basis. I did that because of the freight rate increases which came along during the shipping period.

Q. Mr. Meyers, let me interrupt you.

This decision to go off your plant price and on a delivered price goes back to 1933. The Muskingum project was a long time afterward.

A. That is right.

Q. Well, let us get back to 1933. What were the considerations which affected you there? How is it that this Muskegon study ties into that, if it does?

A. Well, it does not tie into the 1933 acts that we took.

Q. I see.

33364 I am asking you what considerations affected your judgment at that time. Well, what did the Muskegon study show?

A. It showed that Huron in selling the Muskegon jobs on a delivered basis maintained their contract price—destination contract price throughout, while the freight rates

increased, and Huron paid the increased freight rates without making any—without reflecting those increases in the destination cost to the Government.

Q. Well, what would have been the difference in that situation if you sold on a plant basis?

A. The Government would have paid the increased transportation costs.

Q. Did that difference run into very much money?

A. Yes, it did.

Q. How much, about? Roughly.

A. Oh, probably about $5,000 or $6,000.

Q. Well, you spoke of Muskegon in connection with my questions as to March 10, 1933. Did such situations arise before March 10, 1933, similar in principle?

A. Yes.

Q. That is the reason you spoke of Muskegon, is it?

33365 A. Yes.

Q. Well, then, now, was that one of the considerations, matters of that kind?

A. Matters of that kind were considered.

Q. Yes. Now, of course, selling at a plant price, the customer would have had to have absorbed any increase in freight rate?

A. Yes.

Q. Well, how is it that then you thought you ought to go back to the delivered price, so that you absorbed the increased freight rate? By what process of reasoning did you reach that conclusion?

A. Huron service.

Q. Well, I guess those two words don't mean anything unless you explain what you mean, Mr. Meyers. What was Huron interested in?

A. In serving its trade properly.

Q. Well, is Huron interested in seeing that the shipment gets to the point of use at all?

A. Yes.

Q. Have you observed anything in your sales by plant prices that indicates that it is more desirable from Huron's standpoint, or vice versa, to make delivered prices at the point of consumption?

A. Yes.

33366 Q. Just what have you observed in that respect? Can you illustrate it by any specific instance?

A. Well, there are certain destinations where we would rather ship from one plant than another at a slightly higher freight rate to give the customer the same service that he would get—or better service than he would get from a competitor. That is an instance.

Q. Let me put this to you: If cement is going to be used in Alpena, would you rather sell it in Alpena or Detroit?

A. Rather sell it in Alpena.

Q. Why?

A. Because that is the source of the product.

Q. Could you sell it cheaper in Alpena than you could sell it in Detroit to the customer, and he move it to Alpena?

A. Yes, we could.

Trial Examiner Norwood: Do you?

The Witness: I don't quite—

By Mr. Smith:

Q. Do you sell it—is your Alpena price cheaper than your Detroit price plus freight to Alpena?

A. Yes, it is.

Mr. MacIntyre: I do not understand that the Examiner's question included freight there.

Trial Examiner Norwood: Alpena delivered price.

Mr. Smith: The Alpena delivered price—

33367 The Witness (Interposing): Is much less than the Detroit price plus freight to Alpena.

Mr. Smith: Yes.

By Mr. Smith:

Q. Well, has there been any instance in your experience with your company where cement has been bought in Detroit on an f.o.b. Detroit delivery and shipped to Alpena at the customer's expense and used in Alpena right under the doors of your mill?

A. Yes.

Q. When?

A. The last two or three years.

Q. Has that same situation arisen as to other points of delivery?

A. Many of them.

Q. And has that situation persisted over the years?

A. Yes, for several years.

Q. Did such illustrations exist prior to March 10, 1933?

A. No.

Q. What was this situation that you speak of there in Detroit recently?

A. We had two orders from—

Mr. MacIntyre: May we have the date fixed on this?

Trial Examiner Norwood: Yes. When was this?

By Mr. Smith:

Q. Let me refresh your recollection about that, Mr. Meyers.

33368 Is that your memorandum you made on that transaction?

I do not know whether those bills of lading apply to it or not (handing papers to the witness).

Well, looking at that memorandum, can you tell us, the date, the cars, the quantity, the prices, and the whole transaction?

A. Yes.

Q. Who made that memorandum?

A. I made it.

Q. When did you make it?

A. Oh, some time ago.

Q. Well, how long ago? About when?

A. About the first of this year.

Q. I see.

Mr. MacIntyre: And when was the transaction based on?

Mr. Smith: Yes.

The Witness: This particular car moved on June 18, 1939.

33370 Trial Examiner: Well, I am willing to have him
33371 show this instance here, which illustrates an advantage accruing to the Respondents from adopting a delivered price policy.

Mr. MacIntyre: Yes, but it did not go to their decision in adopting the policy. The policy was adopted years ago. This occurred in 1939. It could not have influenced them in the adoption of the policy. That makes it irrelevant and immaterial to the question as to why they adopted the policy.

Mr. Smith: The principle was applicable then.

Mr. MacIntyre: Not at all.

Mr. Smith: It can't help but be at that time.

Trial Examiner Norwood: I think he can show this particular instance, if he will do it briefly.

Mr. Wooden: Your Honor, may I say this one thing?

Trial Examiner Norwood: Yes.

Mr. Wooden: There may be a difference—there is all the difference in the world between a policy of selling at a delivered price and the use of a basing-point system of delivered prices.

Trial Examiner Norwood: Yes, I understand that, but I find that the courts in some of these other cases have permitted full information as to the advantages and disadvantages of the practices. I think, if he will do it briefly; he might illustrate that by this one case.

33372 By Mr. Smith:

Q. Now, can you tell us briefly just what happened in that one case?

A. This car of cement, containing 160 barrels, loaded by us at Detroit, consigned to the Works Progress Administration at Detroit, moved from Detroit via the Michigan Central past our Saginaw plant within two blocks, on up to Alpena, where the cement was used.

Trial Examiner Norwood: That was sold on a delivered price basis, was it?

Mr. Smith: No, it was sold—

The Witness: It was sold in Detroit.

Mr. Smith: —in Detroit.

The Witness: We paid no freight.

Mr. Smith: They paid no freight.

By Mr. Smith:

Qr. It was sold in Detroit, where you have a plant; is that right?

A. Yes.

Q. Now, what was the price in Detroit?

A. The price of it was—the Procurement Division was buying that at $1.66 per barrel.

Q. And what is the freight rate from Detroit that they paid to Alpena?

Mr. MacIntyre: Now, I object. We do not know
33373 from any conclusion of this witness what the rate was that the Government paid to still a third party. We are getting into a confused state here. Probably the Government had some real reason for paying $1.66 in Detroit rather than paying $1.70 or $1.80 base price at Alpena. Probably they had some real means of securing

some special rate from the railroad that this witness knows nothing about. Let us get the facts.

By Mr. Smith:

Q. What was the tariff rate?

A. Fifteen cents per hundred pounds.

Q. What is that a barrel?

A. Fifty-seven cents, approximately; yes, 57 cents.

Q. So if they paid the tariff rate, they paid 57 cents on top of the $1.66?

A. Yes.

Mr. MacIntyre: If Your Honor please—

Trial Examiner Norwood: I overrule the objection.

By Mr. Smith:

Q. And what was the price in Alpena at that time?

A. $1.79.

Q. These other papers do not relate to that, do they?

A. No.

Q. I see.

Well, just one other illustration as to that.

33376 Trial Examiner Norwood: Mark that first paper there.

(The paper was marked for identification "Respondents' Exhibit 2386.")

By Mr. Smith:

Q. Just one other point in connection with that same line of testimony: Did the freight rates go up after you began shipping on the Fort Peck contract?

A. Yes, they did.

Q. Now, Mr. Meyers, you read some of the testimony of witnesses in this case as to how they got the information as to prices that were made in their field, prices by their competitors, by picking up quotations.

A. Yes, I have read some of it.

Q. And by the reports that came in from their own salesmen.

33377 A. Yes.

Q. And correspondence from dealers?

A. Yes.

Q. Would that same general line of testimony apply with equal truth to the way Huron got information as to prices of its competitors?

A. Yes, in a way.

Q. You got them from salesmen who sent you in quotation sheets?

A. Yes.

Q. And dealers talked with you?

A. Yes.

Q. And sent you in sheets?

A. Yes.

Q. Yes.

You came with the company in '26?

A. '26.

Q. Did you at any time after that start to build up any record of prices in your department?

A. Oh, I started to do that in about 1930.

Q. And how, for instance—in what way did you keep your record of the prices that were from time to time made at your plants or at the plants of your competitors? In what form did you keep them?

33378 Q. Did you keep an original record, on cards of the prices at plants from time to time, in your own plants and those of your competitors?

A. Yes.

Q. And did you also keep a current original record of the prices at the different points of consumption?

A. Yes.

Q. And you got here all of your plant price records?

A. Yes.

33379 Q. And you have samples of the other cards on which you kept the record?

A. Yes.

Q. They number several thousand, I figure, covering all your territory.

A. Yes.

Q. Now, were you asked, Mr. Meyers, to take those records and information that came to you from the field—were you asked to build up a factual statement of the changes in your prices from time to time so that you could explain to us what changes were made on your statement of why they were made?

A. Yes.

Q. Did you assemble for that purpose the quotation blanks and other information that was picked up in the field?

A. Yes.

Q. That is assembled in chronological order?

A. Yes.

Q. Now, let us take—you assembled that for the State of Michigan, for one, did you?

A. Yes.

Q. Let us take that. With that before you— Let me ask before I say that: As you assembled this information you made notes transferring onto, I think, yellow sheets—

A. Yes.

Q. —the information from your card system, so 33380 that you carried the change in the prices.

A. Yes.

Q. So as you go down through that you have before you the existing prices from time to time of your own mills and your competitors', the information that came to you, and then the action that you took on it?

A. Yes.

Q. Am I stating it correctly?

A. Yes.

Q. Now, we want to shorten it as much as we can. About what date is your first date that your records permit you to start this statement?

33382 Q. Now, what is the first date, then, that we 33383 started with in your study on Michigan?

Q. What dates shall we start with on Michigan?

Trial Examiner Norwood: What is the date there?

A. We started with November, 1930.

Trial Examiner Norwood: Now, are these instances all within your knowledge at that time?

The Witness: Yes, these competitive quotations pass over my desk.

Trial Examiner Norwood: Yes.

The Witness: And I checked them.

Trial Examiner Norwood: Yes.

33384 By Mr. Smith:

Q. After November, 1930, what was the first change that Huron made in its prices or quotations?

A. On Wyandotte—on January 26, 1931 (referring to document).

Q. Yes.

A. Wyandotte dropped from $1.70 f.d. basis—that is, the trade discount basis—to $1.50 (referring to document).

Q. Why did you do that?

A. On November, 1930, Alpha had been quoting prices in Battle Creek that were lower than Huron; Medusa was quoting in Spring Lake somewhat differently than Huron;

in other words, the Medusa had the "Merry Christmas" basis.

Q. What was that?

A. They gave their customers a Christmas present of 5 cents a barrel at the end of the year.

Q. That is, say, they sold them at $1.50, at the end of the year they gave them back 5 cents?

A. Yes.

Mr. MacIntyre: What Christmas are we talking about now?

The Witness: Merry Christmas,—that is what I called it.

Mr. MacIntyre: You call all of them "Merry"?

Trial Examiner Norwood: What year?

By Mr. Smith:

33385 Q. What year?

A. 1931—1930 and 1931.

Q. Did you find any other quotations as to any other mills besides Medusa, and what was the other mill you said quoted at Battle Creek?

A. Alpha.

Q. Medusa and Alpha?

A. Yes.

Q. Well, now, so that we get this thing started—I do not want to be leading—but it was on those quotations that you made your change in your Wyandotte price.

A. On—

Mr. MacIntyre: What was that? January 6, 1931?

The Witness: Yes, '26, 1931.

Mr. MacIntyre: Can you give us the date on that again?

The Witness: January 26, 1931.

By Mr. Smith:

Q. Were you going to add something, Mr. Meyers?

A. I was going to state that shortly before that time on a job at Monroe, Mich., Huron was quoting on its regular price based on Wyandotte, and we received a letter from—

Mr. Smith: No; you do not have to go— Well, go ahead.

A. Well, we found that Peerless and Medusa
33386 were cutting that price at Monroe, then, on January 26, down went the Wyandotte base.

Q. I see.

Well, now, how long was it before you made another change in a Michigan base?

A. (Referring to paper) March 23, 1931.

Q. About three months later?

(Witness pauses.)

Q. About three months later?

A. Yes.

Q. And what was that change?

A. Alpha dropped from $1.55 to $1.20; Wyandotte dropped from $1.50 to $1.20.

Q. Why did you make that change?

A. Lone Star had cut the price at Detroit, and at Royal Oak, Mich., 8 cents a barrel, and they cut the price at Adrian 19 cents a barrel; and there were other instances of Limedale $1.10, hitting around in Michigan.

Q. Yes.

A. When Limedale started to control Detroit, that was time for Huron to drop its base.

Q. Then, how much did it drop it, did you say?

A. Thirty cents.

Q. Thirty cents?

A. Yes.

33387 Q. Now, what was the next change in your prices anywhere in Michigan?

A. (Referring to document) On March 28, 1931, we found quotations of Marquette at Battle Creek, based on Buffington, $1.10.

Q. How much of a reduction was that; or can't you tell?

A. (Referring to document) I can't tell from this.

Q. I see.

A. It was a reduction.

Q. All right. Go ahead with your story.

A. Huron met Buffington $1.10 on March 28th; that was the next change in our prices.

Q. All right. Now, then, we go along into— What was the next change?

A. In the meantime we found indications at Manitowoc, $1.23, coming across Lake Michigan, that was into the Lower Peninsula, and also into the Upper Peninsula, and we met that.

Q. Were any changes due to the Newaygo's quotations during that period?

33388 A. Yes.

Q. What happened about them?

A. In May, Newaygo was quoting prices in Detroit, or in Michigan, I should say, based on Newaygo $1.10, and that further cut the prices in Michigan.

Q. When did you—

Mr. MacIntyre: May we have the date fixed on that, if you please?

Mr. Smith: He says in May, 1931.

Trial Examiner Norwood: Yes.

A. May (referring to paper)—a letter from our dealer on that, from one of the dealers, in May 13, 1931.

By Mr. Smith:

Q. What did you do about those cuts?

A. Huron met Newaygo's $1.10 when and if it was necessary to retain the good will of its customers.

Q. But you did not publish a new base at that time?

A. No, we did not.

Q. No.

A. However, we did pick up quotations of other companies that—where they published on Newaygo's $1.10.

Q. Go ahead with the next one.

A. The next one I have is on May 29, 1931, a dealer at Battle Creek advised that Alpha was quoting in Battle Creek based on $1 at Belleyue, and on that one Huron told the dealer to buy Alpha at that price. 33389

Q. And you did not meet that?

Trial Examiner Norwood: You refused to meet it?

The Witness: Huron refused to meet it.

By Mr. Smith:

Q. Yes. Was there any other quotation for that time made in that vicinity, or was that just one quotation; do you know?

A. That's the only one that we have in our file.

Q. Yes.

Now, this Newaygo price, over what territory did that cover?

Mr. Smith: Well, will you mark this for identification.

Trial Examiner Norwood: It may be marked.

(A map was marked for identification "Respondents' Exhibit 2387.")

By Mr. Smith:

Q. (Handing Respondents' Exhibit 2387 to the witness) Is 2387 the study you made at that time as to where Newaygo was making those prices?

A. Yes, it is.
Q. Yes. Now, when—
A. That's—
Q. —when you cut your price the result was a
33390 cut in Newaygo's prices or the meeting of the prices at the points in that territory, and some other territory, was it not; that is, it would affect other territory besides that?
A. Yes, this was made, as you will note, on April 10, 1931 (referring to Respondents' Exhibit 2387).
Q. Yes.
A. And it only covers a portion of Western Michigan.
Q. Yes.
A. In May we found at Chesaning, which is not in this colored area—
Q. But that study you made at the time when you were considering the change of your prices?
A. Yes, that's the original.
Mr. Smith: I offer in evidence Respondents' Exhibit 2387 (handing document to Mr. MacIntyre.)

By Mr. Smith:

Q. Well, now, we have got the Bellevue price. Was this the time that Newaygo had a stock up there and unloaded it on Michigan, after they had stopped production, or when was it?
A. Yes, that was the time.
Q. I see.
Now, your next change was about the first of January, was it?
Trial Examiner Norwood: Wait a moment. Let us dispose of this exhibit first.
33391 Trial Examiner Norwood: It is received as marked.
(RESP. EX. 2387 was offered and received in evidence.)

By Mr. Smith:

Q. Was there any change before January 1, 1932, or was that the first one, Mr. Meyers, after that?
A. No, later on, in September, 1931, Newaygo published prices, indicating the use of bases other than a base at their own plant. In other words, at that time Newaygo had withdrawn its base of $1.10. Medusa confirmed
33392 that action at Saginaw, and Newaygo did it at Saginaw.

Q. You didn't do anything?

A. We had not done anything in the beginning, except to meet it when we had to.

Q. I see.

A. So there was no need of doing anything now.

Q. Now, we are down, are we, to—what is the next date, where there was something happened?

A. (Referring to papers) Well, there was a short period before 1932; that is, in October and November, when some of our competitors were quoting in Battle Creek, Middleville and Kalamazoo, still based on Newaygo's $1.10.

Q. And you were meeting them?

A. We were meeting them—we met them when we had to.

Q. All right.

What is the next one? In January, 1933, is that? (Referring to document.)

Q. When did the freight rate increases Ex Parte 103 go into effect?

A. January 4, 1932.

Q. What did you do about that? Did you apply that to your price at all?

A. Yes, I think we—we increased our prices (referring to papers).

Q. About how much was that? Have you got a memorandum there?

33393 A. It was generally known at that time as a 4-cent increase by us.

Q. Yes.

A. And, of course, there were many cases where the freight rates increased 1, 2, and 3 cents.

Q. Yes, I see.

A. In addition to the 4 cents that was indicated in the quotation which Wabash issued at Grand Rapids, where they quoted one cent higher than Huron, on January 6, 1932.

Q. Yes. You did not move yours up?

A. No.

Q. I see. When was your next change?

A. The next indication I got is Wabash quoting at Flint on March 8, 1932.

Q. And then on the 9th—

A. Well, we can leave that.

Q. I see.

A. Let us leave that out to shorten it.

Q. In that same month—no, in April, was there additional evidence at Manitowoc, coming into the Lower Peninsula?

A. Petoskey quoted at Manitowoc April 9, 1932, which figured back to Manitowoc $1.23. We thought we had lost that one along about January 1, 1932, but it came to light again on April 9, 1932, and Medusa did likewise at Ludington on April 21, 1932.

33394 Q. Just a moment, Mr. Meyers, when you first said—you said that Petoskey quoted at Manitowoc, you meant Manistee, did you not?

A. Manistee, yes.

Q. Now, go ahead, there, quoting at Ludington.

A. And Medusa quoted at Ludington likewise, using Manitowoc $1.23.

Q. What action, if any, did you take on that?

A. Huron met this on April 27, 1932.

Q. That is, met the individual prices?

A. Yes.

Q. Was there anything happened in May that year?

A. May 20 the Universal quoted at Lowell, Corunna, Ludington, Baldwin, Jackson, Grand Rapids, based on La-Salle 85.

Q. Plus freight?

A. Plus freight.

Q. What did you do about that? Well, first, before I ask that question, let me ask you: Did that produce lower prices at those points than the existing market quotations?

A. Yes.

Q. Did Huron meet those?

A. Yes. In quotations mailed May 25, 1932, and we applied them retroactive on our billing; that is, the invoices, to May 20th.

Q. So, did that mean a substantial reduction on 33395 the average, or not?

A. Quite a reduction.

Q. Yes. All right.

What is your next one?

A. Universal at Owosso, Alpha at Manistee, and Alpha at Owosso, Universal at Bad Axe, and Traverse City, Birch Run; Petoskey at Manistee; Medusa at Petoskey at Manistee, all of those were July 19, 1932. And Medusa at Corunna, July 21, 1932, quotations based on Huron's

Wyandotte base, and the Alpena base, of $1.20, and this indicated that competitors had ceased the use of the La-Salle base.

Q. Well, is this the story, if I may summarize, they cut the prices over that territory in Michigan on you; you met the cut prices.

A. Yes.

Q. And a month or so later they abandoned the cut prices and came up to your published price?

A. Yes, to our level.

Q. That's right. All right.

A. We confirmed Alpena $1.20 and Wyandotte $1.20 in quotations mailed July 22, 1932.

Mr. MacIntyre: Does it show by whom those quotations were mailed? Is the record clear on that?

By Mr. Smith:

Q. You mailed the quotations?

33396 A. With the exception of one case, and those were only a few I have mailed all or supervised the mailing of all quotations issued by Huron since 1930.

Q. When was the next change on that, Mr. Meyers?

A. This one that I just recalled (referring to paper) is something that Aetna got out but we did not adopt at all.

Q. That is their trucking plan?

A. Their trucking plan, and—

Q. Go ahead.

A. —and it did not mean much to us. We were on a plant price, and I don't know—we didn't do anything about it.

Q. I see. All right. We will pass that. Just stick to the price file.

(Witness refers to papers.)

Q. Down to the first Saginaw base, are you not?

A. Well, in the meantime, in December we had found that Buffington had issued increased prices at desti-

33397 nations in Michigan, and we went along on that increase.

Q. I see.

A. In other words, we let the Wyandotte and Alpena control more territory in Michigan.

Mr. MacIntyre: Well, may we have the amount of the increase on Buffington, and the date?

Mr. Smith: All right.

Mr. MacIntyre: So that it will be absolutely clear?

Mr. Smith: Yes.

Mr. MacIntyre: As to who did it and when?

A. Yes, it went from $1.25 to $1.35, and—

By Mr. Smith:

Q. And you preserved the same Alpena and Wyandotte prices?

A. Yes, yes, we used our same bases.

Q. Just continued them?

A. Yes.

Mr. MacIntyre: What date did he say?

Mr. Smith: That is December 13, 1932.

By Mr. Smith:

Q. All right. Well, now, getting to 1933. When was the first Huron cement shipped at Saginaw, from the Saginaw plant?

A. (Referring to papers) March 17, 1933.

Q. You had got your storage up then?

A. Yes, we had cement in Saginaw for a month or so before that.

33398 Q. Yes. When did you get around to establishing the plant price—the price in Saginaw?

A. It was effective on March 10, 1933.

Q. Was Saginaw then equipped to ship by truck?

A. Yes.

Q. And over how long a period of time had you been planning this Saginaw distribution?

A. I think it started—we started thinking about it in 1930.

Q. Yes.

A. I can mark that by a contract that we had, or I got a rail rate for a contract near Flint. We sold the job before anybody else found out about the new freight rate, and after we had shipped five or six or seven cars on the job, the contractor told us to withhold shipments until further notice, and when I didn't get any notice in a week or so I told the salesman to go over and see what was the matter, it was a nice day, and they ought to be pouring concrete. He went over there and he found that Aetna was serving cement by truck. I think that's when we started to think about a Saginaw base.

Q. To this customer?

A. Yes, to the same customer; in other words, they swiped our contract.

Q. Then, when you put in the Saginaw base you were equipped, then, to distribute by truck out of Saginaw?

A. Yes.

33399 Q. Is the level, the approximate level of Saginaw and Bay City the same, freight rates?

A. Yes.

Q. I notice in your rate book there you had the column headed "Saginaw-Bay City."

A. Yes, in almost every instance the rates from Saginaw are the same as from Bay City based on the intermediate clause of the tariff.

Q. Yes. Well, then, in March, 1933, when you sent out your first Saginaw quotations, I understand that is when you did—is it?

A. Yes.

Q. What were the prices, then, in Saginaw and Alpena and Wyandotte?

A. We used Alpena $1.40, which was an increase of 20 cents a barrel; Wyandotte $1.30, which was an increase of 10 cents a barrel, and Saginaw $1.35, which was a new base.

Q. I see.

Well, now, Aetna was already in Bay City right adjacent to Saginaw?

A. Yes.

Q. How far apart are they,—14 miles?

A. About 11 miles.

Q. Eleven miles?

A. Yes.

33400 Q. So you were setting up a package plant right adjacent to Aetna?

A. Yes.

Q. Now, that base—that price you made there was how much—repeat that.

A. $1.35.

Q. Yes, and that was—

Trial Examiner Norwood: Was that lower than the price had been at that point, in that territory?

The Witness: I don't think that it increased any prices right adjacent to Saginaw.

Trial Examiner Norwood: Did it reduce it?

The Witness: I really couldn't say without going through a lot of this figuring.

By Mr. Smith:

Q. You have not got the Saginaw card in your pocket, have you? That might show you what the going price was at Saginaw.

(Witness makes no response.)

Q. That would be an Aetna price at that time, I suppost, would it?

A. I believe that it was a slight increase in the price because Wyandotte and Alpena were increased at the same time.

Q. I see.

A. However, if you take the price in effect at March 9, and compare it with March 10, March 10 would be 33401 higher, I am quite sure.

Q. I see.

Mr. MacIntyre: If Your Honor please, I just want to call your attention to the fact that we are duplicating in large part the history of the prices and price changes of the Huron Company, as they now appear in the record, some of which appear in the form of testimony with S. T. Crapo, who was general manager of the company; other appears in the form of documents which were prepared in the office of Mr. Crapo.

Mr. Smith: Mr. Crapo testified to nothing about this.

Trial Examiner Norwood: I think that there is some duplicating going on.

Mr. Smith: Nothing about this.

Mr. MacIntyre: Well, Mr. Crapo prepared and turned over to the representatives of the Commission, and they are now in the record, maps showing territory controlled by each of these bases, at the time their basing-point prices changed, the dates on which the basing-point prices changed, and by what amount, from what amount to what amount, in each instance, over a period of years, going back as far as 1928.

Mr. Smith: Not a word in his testimony excepting how those changes came about, and that is the point of 33402 our testimony.

Trial Examiner Norwood: Well, go ahead.

By Mr. Smith:

Q. The next one, Mr. Meyers—what about Wabash over at Greenville? Maybe I can help you.

A. (Referring to papers) As I understand it, you

don't want any examples of where all the other people met the prices which we established, is that right, Your Honor?

Q. If they did you can just state it, but don't let us take too much time; don't let us go into detail on it.

A. April 17, 1933, Wabash quoting in Greenville based on Saginaw $1.25, Huron's price in Greenville was based on Saginaw $1.35, Wabash—

Q. Cut you 10 cents?

A. Wabash cut us 10 cents at Greenville.

Q. What did you do on May 1?

A. We established—

Q. On the Saginaw price.

A. We established Saginaw—we dropped the Saginaw base.

Q. Yes.

A. Ten cents a barrel.

Q. I see.

A. As far as it would go.

Q. Then your Saginaw base of $1.35 only lasted about six or seven weeks?

33403 A. Yes.

Q. And you had to come down 10 cents—

A. Yes.

Q. —due to Wabash's competition?

A. Yes, that's right.

Q. Adjacent.

A. Yes.

Q. All right.

Now, you made some increases on the 7th of July, 1933?

33404 Q. Where were we, Mr. Meyers, when we suspended; at about what date?

A. We had just finished up the May 1, 1933, change in the Saginaw base, where we dropped it from $1.35 to $1.25.

Q. I see.

Now, that was in May, 1933. In July, 1933, did you change your prices?

A. Yes, we did; based on a quotation issued by Peerless at Plymouth, which is dated July 1, 1933, Huron mill quotations increased the Wyandotte price 25 cents, making it $1.55.

Q. And you moved Saginaw and Alpena up at the same time?

A. At the same time.

Q. How much did they advance then?

33405 A. Alpena went up 25 cents.

Q. Did you make a further advance later in that same month on Saginaw and Wyandotte?

A. Yes; based on—

Q. How much was that advance, the second one?

A. Fifteen cents; from $1.50 to $1.65.

Q. How long was that price in effect? Just give the date on that. That was 7/29?

A. We mailed the quotation on July 26th, effective July 29th.

Q. How long did that remain in effect?

A. Until September 15, 1933.

Q. And what happened to it then?

A. Wabash cut the Saginaw base back to $1.50.

Q. And what did you do?

A. We met this cut in price in a limited territory.

Q. What was that territory?

A. Oh, in between Flint and Saginaw and surrounding Saginaw.

Q. Did you mail out quotations on it?

A. No; we mailed no quotations on that.

Q. All right. What was the next change?

A. That Saginaw $1.50 as made by Wabash was used up until and including December 10, 1933.

Q. Did you not make a change in Wyandotte about the first of October?

A. Yes. The Ex Parte 103 increases in rates

33406 expired on September 30, 1933, and we mailed quotations based on Wyandotte only, where the Wyandotte base would make a price against use of $1.50 at Saginaw.

Q. Yes. Now, that carries you into the Code period, and when was your next change?

A. On December 11, 1933, we filed our prices with the Code Authority.

Q. You might give them right there.

A. (Referring to documents) Based on Alpena $1.65; Wyandotte $1.60; Saginaw $1.65; Buffington $1.60; Steelton $1.80.

Q. Yes.

A. Now, at the same time that we filed with the Code Authority we broadcast generally to the trade the quotations based on those bases.

Q. Yes.

Trial Examiner Norwood: Now, wherein are these methods that he is showing here any different from what has already been shown about them meeting prices they find in the field, and meeting the other fellow's reduction and so forth and so on, except the one instance where he placed—initiated a base at Saginaw?

Mr. Smith: The method, Your Honor, may not, in its basis of his practice, may not be fundamentally different; but what we are endeavoring to establish is the variety of prices which resulted—

33407 Trial Examiner Norwood: Yes.

Mr. Smith: —showing the difference continually changing from the variety of the prices. We are not—

Trial Examiner Norwood: Aren't those already in the record, though?

Mr. Smith: No, these are not in the record at all.

Trial Examiner Norwood: Go ahead.

By Mr. Smith:

Q. Go ahead, Mr. Meyers. How long did those prices remain in—or what was the next change, would perhaps be the easiest for you to answer. What was the date of the next change?

A. January 14, 1935, the Alpena, Saginaw, and Wyandotte bases were all reduced 15 cents per barrel.

Q. These were all filed prices, then, in that period?

A. Yes, all filed prices.

Q. I see. Well, now, we are in January, 1935. Tell us what changes took place that year, if any.

A. (Referring to papers.)

Q. There was an increase due to the effect of I. C. C. Ex Parte 115, was there not, of 1 cent?

A. Yes, that increase in freight rates went up effective April 18, 1935, and Huron increased its prices effective May 16, 1935.

Q. Now, did you or did you not discontinue the filing of prices with the Code Authority or the Institute

33408 on the expiration of the N. R. A.?

A. We discontinued the practice.

A. Yes.

By Mr. Smith:

Q. What is the date after which you filed no more prices?

A. May 27, 1935.

Q. Well, now, in the fall of 1935 were there any changes before January 1, 1936?

A. Huron established a new base at Muskegon on November 18, 1935, by quotations mailed from Detroit on November 16, 1935.

Q. That is the same transaction as to which you put in evidence the facts that you have computed the rates
33403 out of Muskegon, and the map, from Muskegon?

A. That's the time.

Q. What effect did that have on prices in Western Michigan, as delineated on that map?

A. It reduced the prices from 1 to 20 cents per barrel in Western Michigan.

Q. Over the territory as indicated on the map?

A. Over the territory as far as its rates would go.

Q. I see.

Q. Do you want to state that?

A. Yes; the new base was that $1.50.

Q. Were there any other changes between that time and the first of January, 1936?

A. No, I believe not.

Q. We are coming down now into 1936. I notice that in June the Wabash cut that Saginaw price. Was that the first change in 1936?

A. Yes; quoted at Flint, cutting the Huron's price 10 cents per barrel, at Flint.

Q. And what did you do? Did you do anything about it?

A. Yes. This Wabash quotation is dated June 2, 1936,
33410 and on June 3 we mailed quotations based on Saginaw, $1.40, as far as it would go; in other words, against the other basis.

Q. What happened to that price? Did the other mills follow it?

A. I have no record of whether they followed it or not.

Q. And when did you change it again?

A. On December 15, 1936, we raised the Saginaw base back up to $1.50.

Q. Have you any quotations picked up after that change was made?

A. No; I have no quotations that were picked up after that, but I notice that I put in here some of Calvin's exhibits.

Q. That are already in the record?

A. Yes.

Q. There is no need to refer particularly to them.

At the last of December, 1936, was there a new price quoted by Wabash at Flint?

A. The freight rate increases under Ex Parte 115 expired on December 31, 1936, and dated December 31, 1936, effective January 1, 1937, Wabash quoted $2.10 per barrel in cloth at Flint, based on Saginaw $1.40.

Q. Was that a cut or an advance?

A. That was a cut of 12 cents per barrel.

Q. What action did you take on that?

A. On January 2, 1937, Huron mill quotes to all the Lower Peninsula of Michigan, giving each destina-
33411 tion in the Lower Peninsula a price of $2.10 per barrel in cloth.

Q. Is that what has been referred to as the "Michigan Plan"?

A. That is what we call the "Michigan Plan."

Q. How long was that in effect?

Mr. MacIntyre: What was that amount?

The Witness: $2.10.

Trial Examiner Norwood: $2.10 delivered at any point in Michigan?

The Witness: That is right.

Trial Examiner Norwood: Who started that?

Mr. Smith: Huron started that.

The Witness: Yes, Huron started that.

By Mr. Smith:

Q. And how long did you keep this flat price all through Michigan in effect?

A. With the exception of Wayne, Oakland, and Macomb Counties, April 22, 1938.

Q. Now, you speak of Wayne, Oakland, and Macomb Counties. What happened as to those counties?

A. We continued the flat prices in those three counties until February 10, 1940.

Q. What was the first Wayne, Oakland, and Macomb Counties' price? When did you first put in the "Michigan Plan"?

A. The Lower Peninsula was $2.10.

Q. When did you put out the different quotations
33412 to Wayne, Macomb, and Oakland Counties?

A. On August 28, 1937, we mailed quotations ef-

fective August 30th, to—we had a change in between there—is it going to be all right for me to use June 23, 1937?

Q. You fix the date.

What did you do then?

A. We reduced the price in Wayne, Oakland, and Macomb Counties 10 cents a barrel; that is, throughout, for each destination in these three counties.

Q. Then on the 28th of August, 1937, effective August 30th, you made this other change you spoke of?

A. Yes.

Q. What was that?

Q. You cut the whole State, including these counties, 10 cents on that date, did you not?

A. Yes.

Q. Now, then, that takes it down until after the date of the complaint.

A. Yes.

33413 Q. All right. Now, will you take your Ohio sheets. See if we cannot make a little faster progress.

A. (Referring to documents.)

Q. When did you establish your price based on Cleveland?

A. February 3, 1930.

Q. That is the first Cleveland price you established?

A. Yes.

Q. When did you establish your price based on Toledo?

A. I first based it, or became really acquainted with the Toledo, on May 25, 1931.

Q. You had a plant at each place?

A. Yes.

Q. And those two were the only plant prices you made in Ohio from that time on, were they not?

A. Yes.

Q. I see. Did this Toledo price at any time run into Michigan at all?

A. Yes.

Q. And how far?

A. Oh, I can recall Lansing.

Q. Did it run into Indiana at all?

A. Yes.

Q. Prior to the time you established your Toledo plant, that was a little while after you put out—no, that was a

little while before you established your Toledo base, was it not?

33414 A. Yes.

Q. Prior to that time were you soliciting business from Wyandotte in Ohio?

A. Yes.

Q. And after the establishment of the Toledo base, where did you solicit your business from—in Ohio—from Toledo?

A. From Toledo.

Q. Not from Wyandotte?

A. Yes, that's right.

Q. Now, your first Cleveland base was in February, 1930. Let us see what the situation was in 1930, and start with that.

What was your next change?

A. The next change that I had a record on was Cleveland going to $1.90 on February 10, 1930 (referring to papers).

Q. That was an advance, was it not?

A. Yes.

Q. And after that when was the next change?

A. November 13, 1930, when it went down to $1.87.

Q. You learned that from these quotations in the field?

A. Yes.

Q. Who cut that price?

A. The record that we have is that Lehigh—on that first change on the $1.87 at Cleveland I have no quotations picked up, but it changed again later in the same

33415 month when Lehigh quoted a lot of special prices around Cleveland.

Q. You mean by "special prices" prices different than the published prices?

Mr. Smith: Now, may I, with your permission, Your Honor, instruct the witness, that when he says "spe-

33416 cial" I wish he would explain what "special" is. I thought that the answer was so simple that I could interject it without objection.

A. When I say "special price," I mean a price that could not be figured back to anything logical as far as my mind was concerned.

Q. All right.

Trial Examiner Norwood: It could not be figured to a base or something?

The Witness: That's right, yes.

By Mr. Smith:

Q. Now, when was that that you caught them at that?

A. December 17, 1930.

Q. And following that in December, were there other prices made by the competition?

A. Yes, and Medusa made a price at Grand Rapids.

Q. Under or over yours?

A. I couldn't figure it.

Q. All right. What about Gibsonburg? Was there one there?

A. Yes, at Gibsonburg they had a price of $2.35, and Huron was $2.35, less 10, and the Merry Christmas nickel, and Huron had $2.46 less 10 and 10.

Q. Who made that Merry Christmas price?

A. Well, in this particular case it was Columbia at Gibsonburg.

33417 Q. What did Huron do about meeting that?

A. Whenever the price was found at a destination to be lower than what Huron had, Huron met it—as far as we could, anyway. The case cited this morning, Battle Creek, is the only one where I know of that we definitely refused.

Q. Now, is there any way that you can summarize the experiences of Huron during 1930 and 1931? Were there many changes in that period?

A. Yes, sir; they happened so fast and furious during that time that they made one's head swim.

Q. Were you able to relate them to any published prices or any base prices—many of them?

A. Sometimes "yes" and sometimes "no."

Q. What about the possibility of your determining what base price Huron mills were making in the territory? Was there a consistent program prepared on the pattern of the prices picked up?

A. No, there were differences in discounts and differences in prices. We just had a very hard time trying to keep up with them; so we just met the price where we found it, and sold cement on the lowest one that we heard about from our dealers and our trade.

Q. Now, that continued for about how long—all through 1930 and 1931?

A. Yes; quite a bit of that time, until 1931, there 33418 were conditions of that kind, until we hit—oh, 1931?

Q. 1930 and 1931; yes.

A. Well, we knew what competitive prices were. We knew what we had to meet during quite a bit of 1931. For instance, when Alpha came out with a flat price all over the State of Ohio, we knew that was in existence, and we met it.

Q. Do you remember when that was?

A. That was the early part of February.

Q. Of what year?

A. 1931.

Q. I see.

A. Alpha's quotation is dated January 31, 1931, and we were organized well enough so that we quoted a flat price in Ohio on February 9, 1931.

Q. What occurred on the 25th of May, 1931, if anything?

A. Huron put in a plant price at Toledo and Cleveland.

Q. Had you or had you not a lot of quotations of varying prices prior to that date?

A. Oh, yes, Limedale had come in there, and the flat price had changed from $2.10 down to $1.90, and there were various other changes before we came out with that—

Q. Was Painesville in there?

A. Yes, Painesville was in there.

Q. How about Ironton?

A. Osborn was in there; Fultonham was in there; Ironton.

33419 Q. Then, what price was it you say you made in May—$1.10 Cleveland?

A. $1.10 Cleveland, and we made the plant price at Cleveland and Toledo for trucks.

Q. How long did that obtain? You have already said it was $1.10?

A. $1.10, yes.

Q. When was the next change?

A. In June, 1931, Cleveland base went down to 95 cents.

Q. Did you send out quotations based on that?

A. We sent the quotations into Cuyahoga County, just a few selected customers here and there that we wanted to quote to retain our good will with them.

Q. And as to the rest of the surrounding territory, you did not send quotations; is that it?

A. That is right. The rest of the territory we just let ride.

Q. Then, what would be the effect in the rest of the territory of not quoting? Would you get business?

A. Not very much.

Q. How long did that condition exist?

A. I can tell better by referring to my card here.

Q. Yes.

A. (After examination of card.) Until August 10, 1932.

Q. What happened then?

33420 A. Cleveland went back to $1.20—or went up to $1.20, from 95.

Q. That continued how long?

A. (Referring to data.) On December 15, 1932, when it was increased 20 cents.

Q. Now, it had gotten back, then, to what price?

A. $1.40.

Q. And did it stay at that until the Code period started, and you filed with the Code?

A. No; it was further increased on July 7, 1933, to $1.65.

Q. I see. And that stayed that way until you filed with the Code; is that true?

A. Yes.

Q. Now, can you tell us when you filed with the Code Authority on your Ohio prices?

A. December 11, 1933.

Q. At the beginning of 1935 what action, if any, did you take about—no, it was in June, 1935. What took place then about car and truck prices out of Toledo?

A. On June 24, 1935, Huron quoted for car and truck delivery in 12 counties surrounding Toledo based on Toledo $1.65.

Q. And the next month, did you pick up any information as to the reaction of the competition to that?

A. Yes. Alpha was quoting in those 12 counties on a carload basis 8 cents lower than Huron's price.

33421 Q. What did you do on getting that?

A. We dropped the Toledo base to $1.57 for the 12 counties, by either car or truck.

Q. I see. So that met their carload price?

A. Yes.

Q. And offered delivery by car or truck; is that right?

A. Yes.

Mr. MacIntyre: Is the record clear as to the date of that?

Mr. Smith: Yes.

Trial Examiner Norwood: That is, delivary by truck on a rail basis,—is that the idea?

The Witness: Delivery either via rail or truck, at the same price.

By Mr. Smith:

Q. What was the next change?

Q. What was the date?

A. July 31, 1935, when Huron dropped it.

Q. You fill in the dates, now.

A. Yes.

33422 Q. How long did that price remain around Toledo?

A. Until September, 1935.

Q. What occurred then?

A. Huron quoted in Lucas County based on Toledo $1.50, a reduction of 7 cents a barrel for car or truck delivery; quoted in Cuyahoga County, car or truck delivery, based on Cleveland, $1.50, which was a reduction of 15 cents a barrel; and in the 11 counties surrounding Lucas County we quoted on Toledo $1.50, which was a reduction of 7 cents per barrel, and discontinued trucking on September 7, 1935, in those 11 counties only. The balance of the State of Ohio we quoted on the basis of Toledo and Cleveland $1.50.

Q. Now, what was the next change? That is down to the Cleveland base, is it not?

A. (Witness examines data.)

Q. Just a moment, Mr. Meyers, before you pass September of 1935, I want to ask you whether Huron mailed quotations in Indiana based on Toledo in that month.

A. Yes. Also in September we mailed quotations on September 6, 1935, effective September 5, 1935, based on Ironton $1.50.

Q. That is, you met the Ironton $1.50 price; is that it?

A. Retroactively, one day.

Q. One day.

Well, then, on the 3d of September how far over into Indiana did that Toledo quotation carry you,—To-

33423 ledo was the lower price.

A. (Referring to data.) Well, we quoted into Indiana as far as specific commodity rates were published in the railroad tariffs from Toledo.

Q. Yes. Well, the rate was actually applied beyond that, was it not, by competition?

A. Oh, yes, they had done that during the Code period.

Q. Well, was it at the time when Toledo was intermediate that the quotation of Silica came in?

A. No, at westbound it first came up during the Code period.

Q. Well, how far did that Toledo base go towards the Indiana and Illinois State line?

A. It went to the Indiana and Illinois State line.

Q. I see. All right.

Now, the next change was in January, 1936; is that right?

A. Right.

Q. What happened then?

A. Huron quoted on Cleveland $1.65.

Q. How did they come to do that?

A. Well, we mailed the quotations on January 6, 1936, effective January 8, 1936, and it is Huron's practice to give its customers five days' notice on an increase when they initiate an increase; therefore, this increase in Cleveland at this time surely must have been initiated by someone other than Huron.

33424 Q. I see. What did you do about Toledo at that time? Did you change Toledo?

A. In the—

Q. That is a "yes" or "no" answer. Did you change Toledo?

A. No.

Q. What was Toledo?

A. $1.50.

Q. What was the effect of keeping Toledo at $1.50 and Cleveland at $1.65 on territory surrounding Cleveland?

A. Well, competition has used the intermediate clause westbound. I used it eastbound, and it practically pushed Cleveland out of Ohio, as far as Cleveland base is concerned, when it went to $1.65. If they could do it westbound, I could do it eastbound.

Q. I know, but I would like to get a statement of it not so much from the traffic standpoint, but what was the practical effect. Which was the lowest price south, and even east, was it Cleveland $1.65 or Toledo $1.50?

A. Most of it was Toledo $1.50.

Q. So that while you moved the base up in Cleveland

by keeping it down in Toledo, you spread the Toledo territory?

A. That is right.

Q. Easterly beyond Cleveland?

A. Yes.

Q. All right.

33425 Trial Examiner Norwood: You say you did not move the price up at Cleveland?

The Witness: We moved the price up at Cleveland, and the Cleveland base was increased to 15 cents per barrel.

Trial Examiner Norwood: Yes.

The Witness: However, the price throughout the State did not take an increase of 15 cents, owing to my interpretation of the tariff.

Trial Examiner Norwood: Well, did your competitors follow you on that raise of price in Cleveland?

The Witness: I cannot say whether they followed us or not, but it made the Huron's price lower than the other fellow's.

Mr. Smith: My understanding of it is, Your Honor, that some competitor raised the price in Cleveland 15 cents, and Huron followed that but did not raise the Toledo price.

Trial Examiner Norwood: That is what I am asking him.

Mr. Smith: So the result was that they could undersell competitors all over in the Cleveland territory.

Trial Examiner Norwood: They had a 15-cent advantage?

The Witness: Well, it is—

33426 Trial Examiner Norwood: In the territory between the two cities, where the freights were equal or less?

The Witness: Yes.

Mr. Smith: Yes; at least a 15 cent advantage. That is right.

By Mr. Smith:

Q. Now, what was the next change in the Ohio situation? May 25, 1936, is the note I have.

A. Yes, I have that date here.

Q. What happened then?

A. On May 25, 1936, Huron established truck prices and practices in additional territory beyond Lucas County.

Q. Five counties?

A. Yes, that made it six altogether.
Q. What was the quotation there?
A. The quotation where?
Q. In those counties, the Toledo quotation.
A. Car and truck prices were the same, based on Toledo.
Q. What was it?
A. $1.50.
Q. And did your competition meet that?
A. Yes, we met it at Luckey on May 26. Standard met it at Napoleon on May 27.
Q. We will pass on from that.
Was there a frequent reduction that fall?
33427 A. Ex Parte 115 increases expire—
Mr. MacIntyre: If Your Honor please, I object to pouring into the record all of these endless details about price changes resulting from freight rate changes. It is just a continuation of a showing that is no different from what we have had heretofore of the use of basing points and changes in those basing-point prices that affect large areas as delivered price quotations by one and all competitors. It seems to me that we are just duplicating the record.
Trial Examiner Norwood: I do not think this is a continuance of that, in the way Counsel is presenting it. He is presenting it in a condensed form; so I think he may complete it.

By Mr. Smith:

Q. Did it reflect the price removal of the Interstate Commerce Commission's order in your price?
A. Yes.
Q. That meant what?
A. A reduction in price.
Q. Was there any other change between that date and the date of the filing of this complaint in your Ohio prices?
A. There was a change in the Ironton base.
Q. I am talking about the Huron price.
A. No, the Huron basis—
33428 Q. Huron basis remained the same?
A. Yes.
Q. All right. Now, that brings us right down to the time of the filing of the complaint; is not that true?

A. Yes.

Q. Will you now turn to New York?

Before you opened the Buffalo plant in 1928, did you have any business in Western New York territory, and if so where did you ship it from?

A. We were shipping into the Niagara frontier destinations; that is, Niagara Falls, Buffalo, and North Tonewanda from our plants at Wyandotte, Detroit, and Cleveland.

Q. And your first prices made—when did you first make a Huron price on Buffalo?

A. By that you mean on the cars that we had been shipping into Buffalo?

Q. No.

A. After?

Q. After you opened the Buffalo price when did you start making your prices based on Buffalo?

A. We used the prices that we found there.

Q. Well, you made your own price at some date, didn't you, later?

A. (Referring to document.) In New York State the confusion was something similar back in those days, 33429 in my mind, as to what was—Huron was using a base of $1.95 at Buffalo, on the date that the first shipment moved out of the Buffalo plant.

Q. Yes, but the point I am getting at—at some time later, as I am advised, Huran established its own base at Buffalo, is that not true?

A. Yes, the history will show that.

Q. Yes, but I am trying to get that date as a starting point.

A. Let us see if I can (referring to data)—May 25, 1931.

Q. I see.

Now, prior to that time you were selling on prices of your competitors?

A. Yes.

Q. And, then, let us start May 25, 1931. And what was your Buffalo Huron price at that time?

A. (Referring to data.) $1.20.

Q. Yes. How long did that continue and what brought about the next change?

A. On May 25, 1931, we also established a plant price at Buffalo for trucks. I wasn't sure about that yesterday.

Q. I see. Well, what was that price you established?

A. $1.60 is cloth.

Q. That would be—
A. $1.20 plus 40 for sacks.
Q. And prior to that date what was the price of the other fellows at Buffalo?
33430 A. We based on Painesville $1.06.
Q. Well, I have here a notation that on the 19th of May the Buffalo price was $1.76 and $1.25. You made a price of $1.20, cutting it 56 cents.
A. That $1.76 is a continuation of the $1.76 when it did control something, but after—
Q. Well, is that a fact?
A. Immediately prior to May 25, 1931, Buffalo $1.76 did not control; Painesville controlled.
Q. I know, but was that price the published price at the Buffalo mill—not your mill, the other.
A. No.
Q. What price did control in there?
A. The price built up by Painesville $1.06.
Q. And what is the relation in Buffalo of your price then of the 25th of $1.20 and the price built by Painesville? Did you raise or lower it, or what?
A. (Witness figures.) They lowered the delivered price in Buffalo.
Q. I see. So that is the time you took the initiative in making of Buffalo prices?
A. Yes.
Q. All right. Now, let us see if we can pick up the date that that was changed.
I assume, Mr. Meyers, that you have a whole mass
33431 of quotations that were picked up there?
A. Yes.
Q. Just as you had in Michigan?
A. Yes.
Q. And you had then in support of your Ohio data, as well, did you not?
A. Yes.
Q. All right. Let us pick up the next.
33433 Q. When did you pick up the next change?
A. (Referring to data.) December 15, 1932, in quotations which Huron mailed December 9, 1932, increasing the Buffalo base from $1.20 to $1.40.
33434 Q. Yes. Then after that what is the next transaction?
A. (Referring to data.) Based on competitive quota-

tions picked up in the field, Huron mailed quotations July 7, 1933, effective July 11, 1933, increasing prices based on Buffalo $1.75, an increase of 25 cents a barrel.

Q. Now, we are in the Code territory; are we?

A. Yes.

Q. How long did those stay in effect?

A. As far as I can see, through the entire Code period.

Q. Were there any other changes during that period, from 1933 to July, 1937, which you made note of, or have we covered it?

A. Well, I have gone through these so quickly that I have not checked each change as it came along.

Q. All right. Now, let us go over to Oswego.

When did you initiate a plant price in Oswego?

A. We had a plant price in Oswego in the latter part of 1932.

Q. When did you open your plant there?

A. August 19, 1932.

Q. What was the first mill that made a plant price on Oswego?

A. May I have that question, please?

Trial Examiner Norwood: Read it.

(Question read.)

A. Huron.

33435 By Mr. Smith:

Q. There never was any other mill there, was there?

A. I don't know. I have never been to Oswego.

Q. You do not know of any other there, do you?

A. No, I do not.

Q. What do we say about the Oswego price? Have there been changes in that, and can we summarize those?

A. Generally, during the period from August, 1932, up until July 16, 1938, the price in the Oswego area was based —that is, the delivered prices were based on either Buffalo or at times other bases; mostly in that territory up there they were based on Buffalo.

Q. Well, you made a plant price at Oswego?

A. Yes; we had a plant price for trucks there.

Q. Let us go back. What was your first price in Oswego?

A. The first price in Oswego was for a large construction job, paving construction, and it was a special price at the plant.

Q. What year was that?
A. 1932.
Q. Do you remember how many barrels you shipped on that job that year, 1932, approximately?
A. Probably as much as 50,000 barrels.
Mr. MacIntyre: Just a moment. May we have a more definite date, as well as the name of the party and
33436 the price that was involved. We are talking now about a special price and we do not know to whom or when or what level.
Mr. Smith: Well, Your Honor—
Trial Examiner Norwood: Explain that special price for us.
The Witness: The price was given to the contractor at a $1.40 in bulk f.o.b. our plant.
Trial Examiner Norwood: The one contractor?
The Witness: Yes; on that one job that we had at the time.

By Mr. Smith:

Q. Now, that was your first price?
A. Yes.
Trial Examiner Norwood: You did not consider that a change in price did you? You just granted one customer a special price.
The Witness: Well, there was a change from what the delivered price was in Oswego at that time.

By Mr. Smith:

Q. Well, Mr. Meyers, did you have your plant there at that time?
A. What I call a plant; yes.
Q. I am talking about what I call a plant. Did you have what I call a plant there at that time?
33437 A. No; we had a boat there.
Q. What did you have there?
A. We had a boat there.
Q. Was that the first sale, or not, that you made in Oswego, from that boat?
A. From that boat, yes.
Q. Then, you had no previous Oswego price there, did you?
A. No.
Mr. Smith: Does that make it clear, Your Honor?
Trial Examiner Norwood: Yes.

By Mr. Smith:

Q. Now, when did you publish an Oswego price to the trade?

A. July 16, 1938.

Q. Never before that time?

A. No.

Q. From the time you went in there until then?

A. No.

Q. Were not any prices constructed on Oswego in that territory, from 1932 to 1938?

A. No; the first base at Oswego was July 16, 1938.

Q. And prior to that time, on what plants were your prices constructed?

A. Buffalo.

Q. Buffalo.

A. Yes.

33438 Q. Mr. Meyers, there was a trucking situation around Oswego. Can you explain how you handled the trucking situation there?

A. For a time we trucked to a limited territory, and the price delivered by truck was 5 cents higher than the carload price.

Trial Examiner Norwood: When was that?

The Witness (Referring to data): The first record that I have of that on my price card was in December, 1933, and that situation extended over a period to and including July 30, 1935. On July 31, 1935, we dropped the nickel. Then—

Trial Examiner Norwood: Now, in that, you delivered to the customers' trucks?

The Witness: No, that was delivered by equipment hired by—

Trial Examiner Norwood: And you charged 5 cents a barrel in lieu of freight?

The Witness: No, the five cents per barrel was rather—well, until we got organized and could get efficient trucking facilities to handle a large volume of truck traffic,

33439 it was necessary to put some sort of a restriction on.

Trial Examiner Norwood: Well, that was 5 cents on top of the delivered price at destination?

The Witness: That was 5 cents higher than the delivery-by-rail price.

Trial Examiner Norwood: Yes.

By Mr. Smith:

Q. And then you have given the date when it was taken off?

A. It was taken off on July 31, 1935, and we found that—it was off for a period of about two months—and we found that we were not quite set up, some of the things that we expected to be able to do by truck did not materialize, and we put the nickel back on September 24, 1935. Then on September 14, 1937, we dropped the nickel.

Q. During this period who employed, if anybody did, the trucker that handled the shipments?

A. We did.

Q. I see. Who would handle the dispatching of the trucks and supervise their operation?

A. The plant superintendent.

Q. I see. What is the name of the concern that now handles your trucking there?

Mr. MacIntyre: I object to going into further details about trucking operations of this nature. They are 33440 not in issue.

Trial Examiner Norwood: I think that the Counsel is correct about that.

Mr. Smith: Unless, Your Honor, the Government expects to claim that the 5-cent charge that we had there, which was—the restriction on the truck deliveries—

Trial Examiner Norwood: Yes.

Mr. Smith: —was a part of the combination, a part of our agreement alleged to implement the combination of prices by the restriction of trucking; if they are not going to claim that, why, I do not want any of this in.

Mr. MacIntyre: We will claim that—and it is claimed in the complaint—the failure to give f.o.b. mill unrestricted prices to dealers who wanted deliveries made at the mill in their trucks was a result of a combination.

Trial Examiner Norwood: I do not see that the name of this man who did the hauling for this concern—or even that this manufacturer employed trucks and delivered cement by trucks, is relevant at all.

Mr. Smith: It would only be relevant as assisting in the explanation that when they got the responsible trucker, and their arrangements made where they could give efficient delivery, had equipment that could do that, that then they took the 5 cents off. That is the only pertinency of that.

33441 Trial Examiner Norwood: All right.

Off the record.

(There was a discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Smith: May I make one additional observation, Your Honor?

Trial Examiner Norwood: Yes.

Mr. Smith: The complaint does charge that there is a concerted effort in certain parts of the country to charge customers requiring deliveries by trucks 15 cents per barrel more than producing Respondents charge to customers that require delivery by rail. We did charge 5 cents more here.

Trial Examiner Norwood: That was when the trucks were available, that is, the cement was delivered at the factory to the customers' trucks. I mean, the charge is that, and that 15 cents, then, was added on to the f.o.b. or base price.

Mr. Smith: Yes.

Trial Examiner Norwood: This other does not meet that at all.

Mr. Smith: Very good.

Trial Examiner Norwood: I think I should rule that out. The objection is sustained.

Mr. Smith: Perhaps Your Honor would permit me
33442 to make a brief offer of proof there.

Trial Examiner Norwood: Oh, yes.

Mr. Smith: We offer to prove that the five-cent additional charge at Oswego was imposed because of our inability to secure responsible truckers, with suitable equipment to handle properly our product, and that when that was secured we took off the five cents, and in that same connection I will make an offer as to what will be coming up later—but, I suppose, maybe, that covers it.

Trial Examiner Norwood: Yes; I think you had better not mix up the two offers there.

By Mr. Smith:

Q. Now, Mr. Meyers, will you turn to your Wisconsin file.

A. Yes, sir.

Q. When was the Milwaukee plant opened?

A. October 1, 1923.

Q. You have another plant now in Wisconsin, have you?

A. Yes; at Green Bay, as of May 26, 1938.

Q. So that there was no more than the Milwaukee plant there from 1923 to the date of the filing of the complaint; is that correct?

A. That is right.

Q. Now, can you start in and give us the changes in prices out of Milwaukee?

A. Up until May 25, 1931, the history in Wiscon-
33443 son is pretty much the same as in the other States, but I believe we can start out at that date.

Prior to May 25, 1931, we had a plant price for trucks, with freight allowances, and on May 25, 1931, we established a plant price for trucks at Milwaukee, the same as we did at those other plants.

Q. Let us be definite as to what you mean by plant price for trucks with freight allowances.

A. Prior to May 25, 1931, we charged the destination prices at the plant, and then gave the customer the rail rate as trucking compensation.

Q. And he took it away in his trucks?

A. And he took it away in his trucks.

Trial Examiner Norwood: That was equivalent to an f.o.b. mill sale, was it not?

The Witness: Yes, sir; by the time you took the freight off; yes, that is what it was.

By Mr. Smith:

Q. How long did that continue?

A. Until May 25, 1931, and then we put in the straight plant price on the $1.20 base at Milwaukee, which, incidentally, was the first base at Milwaukee, $1.20, plus 40 for costs, making a plant price of $1.60 at Milwaukee plant.

Trial Examiner Norwood: That is, delivered to trucks at that place?

33444 The Witness: Delivered at trucks at our trucking platform.

Trial Examiner Norwood: That was an f.o.b. price, was it not?

The Witness: An f.o.b. mill price; yes, sir.

By Mr. Smith:

Q. How long did that continue?

A. We still had it in March, 1932—until August, 1932.

Q. What occurred then?

A. We established a delivered price by truck in a radius

of 30 miles on August 6th, and then on August 8th we extended it to a radius of 50 miles from Milwaukee.

Q. Who made the delivery then?

A. We did.

Q. That practice was continued for how long, Mr. Meyers?

A. Until during the Code, when the area was extended, and the extended area is still in effect.

Q. Can you save us any amount of time, Mr. Meyers, by going through your notes there and giving us briefly any changes in your prices and the reason therefor—the dates and figures and the prices?

A. During 1932 there were such bases as our Sugar Creek, which got into that territory; Sugar Creek, 85, which Huron found out about on April 1, 1932; LaSalle, 85, which Huron found out about on May 25, 1932,
33445 and adopted retroactively to May 20th, which was the date of the quotations picked up. Then there was a stabilization—no, not a stabilization, but a return to higher levels, of the LaSalle base. On July 18, 1932, quotations showed that Lone Star and others were quoting base on LaSalle of $1.25, and during that entire period we were still calling Milwaukee $1.25—I want to verify that figure right here—(after examining of papers)—that is right; we were still calling Milwaukee $1.20, and meeting all of these other cut prices, where we found them.

Then there was a major change; there was a general change in prices in July of 1932. Huron waited until they had evidence of all the increased bases, and on July 22d we sent out quotations based on Milwaukee at $1.40, which is an increase of 20; Buffington, $1.25, which was an increase of 15 cents; Mason City, $1.35, an increase of 25 cents; LaSalle, $1.25, an increase of 40 cents; Manitowoc, $1.45, an increase of 22 cents, and Steelton, $1.45, which, according to our records, was a decrease of 16 cents.

In other words, Huron waited until July 22 to make these increases in prices. Then we had that 30 and 50 mile radii that I spoke of a few moments ago on the trucking situation. That was on August 8th. August 13th, Manitowoc met it at Milwaukee.

Then came the December 13, 1932, increases, and on December 10, 1932, effective December 13, 1932,
33446 Huron mailed quotations on Milwaukee $1.50, which was an increase of 10 cents in the Milwaukee base,

and on December 12, two days later, effective December 15, 1932, Huron quoted outside of the area around Milwaukee, using increased bases at Buffington, Milwaukee—or, Buffington, Manitowoc, and LaSalle, all of them going up 10 cents.

The next one is June 1, 1933, a general reduction of freight rates.

Trial Examiner Norwood: Well, did the price change any more than the freight rate there?

The Witness: No, no change in bases.

Trial Examiner Norwood: Well, were a considerable number of these price changes that you have given here no more than to meet changes in freights?

The Witness: No, when they have; I have generally mentioned that they were either reductions or increases in freight rates.

Trial Examiner Norwood: Yes.

By Mr. Smith:

Q. Now, those would be general all over the country—all over your territory?

A. Yes, fairly so.

Q. How many were there of those general advances?

A. Well, there was Ex Parte 103, Ex Parte 115; 115 reopened, and 123.

33447 Q. Yes. When they expired the prices went down, and when they put on the increase, the prices went up?

A. That's right.

Ex Parte 115 reopened, and Ex Parte 123, the increases are permanent. When I say "Ex Parte," I mean an Ex Parte proceeding of the Interstate Commerce Commission.

Q. We understand.

A. July 1—or dated July 1, 1933, effective July 7, 1933, Manitowoc quoted in Milwaukee at $2.40 cloth, which indicated an increase of 25 cents per barrel.

On July 3, 1933, effective July 7, Huron quoted on Milwaukee $1.75, which is an increase of 15 cents; and on July 7 they quoted on Mason City $1.70; Buffington, $1.60; LaSalle, $1.60; Manitowoc, $1.80, all of which were increased 25 cents.

Q. What is the date of that?

A. July 7, 1933.

Trial Examiner Norwood: That is, to meet that other price that you found, always?

The Witness: Yes.

A. (Continuing) September 30, 1933, Ex Parte 103 increases in rates expired on Wisconsin traffic, and Huron reduced its prices. And then we come to the Code period, Huron filed its prices on December 11, 1933, based on Buffington $1.60; LaSalle, $1.60; Manitowoc, $1.80; Mason City, $1.70; Milwaukee, $1.75; Steelton, $1.80. And during the Code period LaSalle was raised from $1.60 to $1.75.

33448 March 6, 1935, an increase of 15 cents per barrel.

Huron prepared to send quotations based on the filing received from the Code Authority, but we did not mail them.

Then on March 19, pursuant to advice from the Code Authority, Huron did raise prices where governed by Buffington, $1.70, and LaSalle, $1.70, each of them increasing 10 cents. I mentioned that during the Code Authority that Huron quoted on an additional, or an extended trucking area, around Milwaukee, and that was done in quotations mailed March 18, 1935, effective March 20, 1935. Had another increase in freight rates—the rates became effective April 18, 1935. Huron filed its prices with the Code Authority—or, rather, Huron mailed quotations pursuant to advice from the Code Authority.

June 15, 1935, Ex Parte 115, increases became effective on intrastate traffic, and Huron increased its prices with quotations mailed June 14, effective June 20.

Ex Parte 115 rates expired 12/21/36, and Huron reduced its prices effective 1/2/37.

On July 12, 1937, effective—or, I said "July," I mean June 12, 1937, effective June 14, 1937, Huron mailed quotations into Wisconsin based on Milwaukee $1.70, a reduction of 5 cents per barrel.

Then we have another rate increase November 15, 1937, known as—

Q. That is after the complaint; you may leave that out.

33449 A. All right.

Q. Now, Mr. Meyers, Mr. Crapo was asked on the stand—

Trial Examiner Norwood: (Interposing.) I believe I would just ask this witness for the facts without any reference to any previous testimony.

Mr. Smith: Yes.

By Mr. Smith:

Q. Did the Buffington base, plus freight, into southwestern area of Michigan make a higher or lower delivered price than the flat price you had in effect during the time of the Michigan Plan?

A. The flat price on the Michigan plan was lower than the Buffington base, plus freight into Michigan; that is, the Lower Peninsula.

Q. I ask you whether, in any case at your auxiliary plants on the Lakes your base price has been at any time the equivalent of some other base price plus freight to that point?

A. No, it has not.

Trial Examiner Norwood: Will you read the last question, please?

(Question read.)

Trial Examiner Norwood: You mean the base price or delivered price?

Mr. Smith: Well, I am quoting Mr. Wooden's question exactly. I imagine he meant the base price.

33450 Trial Examiner Norwood: All right. Go ahead.

Mr. Smith: Will you mark this.

(The document was marked for identification "Respondents' Exhibit 2388.")

By Mr. Smith:

Q. I show the witness the exhibit marked for identification 2388, a map, and ask who prepared it.

A. I made it.

Q. When did you make it?

A. July 23, 1937.

Q. It is a map of what?

A. It is a map of the United States, issued by Rand-McNally.

Q. Certain portions of it are colored. Let me show it to Counsel. First, I will ask you one more question about it. Certain portions of it are colored. What do those indicate?

A. The extent that the Huron bases at the Lake ports control the prices throughout the area.

Q. That is as of what date?

A. June 30, 1937.

Trial Examiner Norwood: You added the colorings to the map, did you?

The Witness: I added those colorings to the map, and the figures I put in in ink.

By Mr. Smith:

Q. I notice, for instance, you have marked
33451 "Toledo," and there appears $1.50. What is that intended to be?

A. That means it was Toledo base, $1.50.

Q. And Cleveland.

A. $1.65.

Q. And Detroit?

A. The yellow portion in the middle, the Lower Peninsula of Michigan, was on the Michigan Plan at that time, and the figure with the arrow pointing to Detroit indicates that the price in the area marked in ink around Detroit was $1.60 delivered, while the rest of the Lower Peninsula, with an arrow drawn out, shows that for the balance of the Lower Peninsula it was $1.70, delivered for the Lower Peninsula, exclusive of the three counties which I have attempted to put in ink surrounding Detroit.

Q. Then, what are these other names scattered here and there over the United States?

A. Various basing points. For instance, here is a dot on Norfolk, with a price; "R.C.," Richard City in Tennessee; Mitchell, Ironton, Universal, Limedale, LaSalle, Mason City, Rapid City—

Q. Now, what was the purpose for which you compiled that map, Mr. Meyers?

A. To show the extent of the control of Huron basis around the Lakes against the basis in the hinterland.

Q. Does it show also the prices at all of these
33452 points, so that you can make a comparison between them?

A. The base prices; yes.

Q. Where did you get the prices, for instance, for Buffington, LaSalle, Limedale, Mitchell, Ironton, Universal, and Pittsburgh?

A. In the regular course of picking up quotations here and there.

Q. Does that apply to Mason City, too?

A. Yes.

Q. And to Rapid City?

A. Yes.

Q. Did it apply to this little town near Chattanooga?

A. It won't apply there nor will it apply to Birmingham, nor the one in Texas.

Q. Where did you get those figures?

A. I got those from the Engineering News Records, the issue, as in effect on June 30, 1937.

Q. You have Thomaston, Me., but not any figure on there.

A. I did not know what it was.

Q. And these figures at Hudson and Alsen and Northampton, did you get them from the books or in the regular course of business?

A. In the regular course of business, knowing the base prices.

Mr. Smith: We offer that as graphically showing
33453 the relation between the prices on the Lakes as of the date on the map with other prices in the surrounding territory.

Trial Examiner Norwood: It will be received and marked.

Mr. Smith: Your Honor will give me just a moment?

Trial Examiner Norwood: Yes. That will be marked "Respondents' Exhibit No. 2388."

(RESP. EX. 2388 was offered and received in evidence.)

Mr. Smith: Will you mark this for identification, please.

Trial Examiner Norwood: It may be marked "Respondents' Exhibit 2389."

(The document was marked for identification "Respondents' Exhibit 2389.")

By Mr. Smith:

33454 Q. Mr. Meyers, I show you Respondents' Exhibit, for identification, 2389, and ask yor if we did not request that you attempt to put in a graph the variations in the story of the Michigan prices as you have related them on the stand,—and is this the graph that you produced from that data (handing to witness map)?

A. Yes, I made that graph.

Q. That was done when?

Trial Examiner Norwood: I think you might let the witness tell us what it is.

By Mr. Smith:

Q. Will you tell us what it is, Mr. Meyers (referring to Respondents' Exhibit 2389)?

A. All right, sir.

When the bases started to drop, back in 1931, I got the idea in my head that I would like to see what it looks like on paper, so I started out with the bases in effect August 1, 1928, using Buffington, which is the purple color; blue, which is the Wyandotte color, and red, which is the Alpena color. Then, from time to time, as the bases changed, I made a record of it on this chart, and with the dates on
33455. which I knew of the changes, and I kept it right up until we went off the Michigan Plan entirely on February 10, 1940.

Q. Mr. Meyers, this, then, is a graph that you have had in progress all of that time?

A. Yes.

Mr. Smith: All right, I offer in evidence Respondents' Exhibit 2389 (handing document to Mr. MacIntyre).

Trial Examiner Norwood: Just what does that show, fluctuations in prices?

Mr. Smith: Fluctuations in prices in Michigan during the period.

Trial Examiner Norwood: And is that based on facts in the record?

Mr. Smith: Yes, that is my question.

Trial Examiner Norwood: Based on these prices that he has already given?

Mr. Smith: That he has already stated.

Trial Examiner Norwood: Yes.

Mr. Smith: And as he explained he made it up progressively as prices have changed over the entire period.

Trial Examiner Norwood: Yes.

33456 *Examination on Voir Dire by Mr. MacIntyre.*

Q. Mr. Meyers, I believe you stated something about this Respondents' Exhibit 2389 showing, or reflecting to some degree, those flat prices in Michigan. Where is that shown on this map? Maybe I misunderstood you.

A. (Referring to Respondents' Exhibit 2389.) Here we have here on January 4, 1937 (indicating). I say in here "Bases for U.P. only." That means for Upper Peninsula only.

Q. Yes.

A. And then continuing on the line I show Michigan Plan, Lower Peninsula, $2.10, that means $2.10 cloth.

Q. It means, then, that beyond this date of January 4, 1937, the basis as shown on here applied only in the Upper Peninsula of Michigan?

A. That is January 4, 1937.

Q. Yes, in so far as the State of Michigan was concerned?

A. Yes.

Q. Of course, you don't know whether that applied
33457 outside of the State of Michigan?

A. The Michigan Plan? No.

Q. No, these bases,—they did not apply in the Lower Peninsula of Michigan from that time on; it would apply in the Upper Peninsula and States outside of Michigan, so far as you know; is that correct?

A. Yes, during the period.

Q. That is, from January 4, 1937, on?

A. Yes.

Q. The bases that are shown there, while applying in other sections, did not apply to the Lower Peninsula of Michigan?

A. Lower Peninsula, that's true, of Alpena and Saginaw.

Q. Well, they did not apply anywhere in the Lower Peninsula—

A. No.

Q. —except—

A. No.

Q. —that is, except previous to that date?

A. And, of course, after April 22, 1938.

Q. Yes, but between those two dates they did not apply in the Lower Peninsula?

A. That's right.

Q. But applied elsewhere, the Upper Peninsula and outside of the State; is that correct?

A. The Upper Peninsula.

Q. And outside of the State of Michigan?

33458 A. (No response.)

Q. The Michigan Plan would not have affected their application outside of the State of Michigan, of course?

A. No.

Mr. MacIntyre: We make no objection to the exhibit.

Trial Examiner Norwood: It will be received as marked. Does that show the dates and price fluctuations?

Mr. Smith: Yes, Your Honor.

Trial Examiner Norwood: At various times? Look at the dates.

The Witness: I start with August 1, 1928, up to February, 1940.

By Mr. Smith:

Q. Just for Michigan; is that right?

A. Just for Michigan.

Trial Examiner Norwood: It will be received and marked as Respondents' Exhibit No. 2389.

(RESP. EX. 2389 was offered and received in evidence.)

By Mr. Smith:

Q. Mr. Meyers, did you make a tabulation of the 33459 comparison between truck and rail rates?

A. I have made such a statement.

Q. Will you produce it?

(The witness produced a paper.)

Mr. Smith: Will you mark this?

(The document was marked for identification "Respondents' Exhibit 2390-A to 2390-F.")

By Mr. Smith:

Q. Showing the witness Respondents' Exhibit 2390, for identification, I will ask him to describe it.

A. Exhibit 2390 shows a comparison of truck rates as paid by the Huron Cement Company, with the rail rates in effect as of June 30, 1937, and the rates in effect as of February 15, 1940, shown for comparative purposes.

Q. The first four sheets I see are a tabulation; are they?

A. Yes.

Q. What is on the fifth sheet?

A. A list of the tariffs in which the rail rates were given and a list of the trucking carriers to whom the freight was paid.

Q. That is on the sixth page, however.

A. On the sixth page.

Q. I see your note of explanation gives the reference to the public filing of the trucking rates; does it?

A. Yes.

33460 Mr. Smith: I offer this exhibit in evidence.

Trial Examiner Norwood: There are extra sheets there?

Mr. Withrow: Yes; they should be sub-lettered.

Trial Examiner Norwood: Yes; Respondents' Exhibit 2390, with sub-letters.

Mr. Wooden: Six sheets.

Trial Examiner Norwood: A to F—Respondents' Exhibit 2390-A to F.

Mr. Smith: That was offered, Your Honor.

Trial Examiner Norwood: Yes.

Mr. MacIntyre: I would like to ask the witness a question about this.

Trial Examiner Norwood: Go ahead.

Examination on Voir Dire by Mr. MacIntyre.

Q. When did you, Mr. Meyers, make up this Respondents' Exhibit 2390?

A. Just recently.

Q. Well, what do you mean by that?

A. On February 15th, I believe it was, or thereabouts.

Q. 1940?

A. 1940.

Q. And for that purpose?

A. Because Mr. Smith asked me for it.

33461 Q. For use in this case?

A. I presume so.

Q. From what sources did you get the information that appears in this exhibit?

A. From the freight tariffs listed on pages 5 and 6, and from the truck contracts that we have with contract carriers on file with the various State commissions. One of them is on file with the Interstate Commerce Commission.

Q. Which one is that?

A. George E. Whitaker, doing business as Whitaker Trucking Company, as Sylvania, Ohio, has an interstate contract on file with the Interstate Commerce Commission.

Q. What number is that filing, if reference is to be made to it?

A. I do not know whether I have that one with me or not (referring to papers); as of June 30, 1937, Whitaker's M. F.—I. C. C. No. 6 was in effect.

Q. Is that the one that you were just referring to as being on file with the Interstate Commerce Commission?

A. Yes; that is on file with the Interstate Commerce Commission.

Q. You used that one in comparing rates to the same destination for which rail rates are shown on Respondents' Exhibit 2390 of February 15, 1940?

A. No.

33462 Q. I see the statement here—

A. That is a different number.

Q. I see the statement here under "B", on the first page of 2390, to the effect that:

"Present rail rates in effect as of 2/15/40."

Were those the effective dates of the rail rates that you used in making this comparison?

A. This "B" column, you mean? Do you mean the "B" column?

Q. It is the fourth typed line on the first page of Respondents' Exhibit 2390.

A. Well, that says: "Present rail rates in effect as of 2/15/40."

Q. Were they the rail rates that you used throughout this tabulation for the purpose of comparing trucking rates?

A. Yes.

Mr. Smith: Just a minute. We object to that. Column "A" is rail rates in effect June 30, 1937. It appears right on the face of the exhibit. If I understand Mr. MacIntyre he is trying to get the witness to say he is using the rail rates in effect on February 15, 1940. Column "A" is the rates in effect on June 30, 1937. Column "B" is the rates in effect at the present time.

Mr. MacIntyre: I am only asking the witness to give us some information on it, Mr. Smith. I am not trying to get him to make any statement.

33463 Trial Examiner Norwood: Where did you get the column "A" rate?

The Witness: From the railroad tariffs in effect.

Trial Examiner Norwood: At that time.

The Witness: As of June 30, 1937.

Trial Examiner Norwood: Have you cited those tariffs, so that they may be referred to?

The Witness: I have cited the tariffs in effect June 30, 1937, and those in effect February 15, 1940.

Trial Examiner Norwood: And you are using the trucking rates as of the same dates?

The Witness: Yes.

By Mr. MacIntyre:

Q. Mr. Meyers, what does it mean on this fourth line on the first page, where you say:

"Present rail rates in effect as of 2/15/40."

What do you mean to imply by that statement, as it appears on that page?

A. I was making this statement about February 15, 1940. That mean "present" to me; so I used the date as of February 15, 1940, for the column "B" rate.

Q. Well, now, let us get straightened out on this. Are the column "B" rates effective as of that date or effective as of June 30, 1937, as Mr. Smith has stated?

Mr. Smith: I did not state that.

33464 Q. Well, tell us as of what date the rates under columns "A" and "B" were effective, Mr. Meyers?

A. The rates in column "A" were in effect June 30, 1937. The rates in column "B" were in effect on February 15, 1940.

Q. Thank you.

Now, what about the dates on which the trucking rates were in effect that appear in the first two columns of the tabulation?

A. You mean the first column?

33465 Q. The first two columns referred to, that relate to truck rates.

A. The first column is truck rate in cents per barrel; the second column is truck zone 10-mile block radii.

Q. All right. When were those in effect, for those two columns?

A. They have been in effect throughout the entire period, except as noted in connection with the asterisk at the bottom of the page.

Q. In other words, except as noted, they were in effect throughout the period of 1937, 1938, and 1939, and to date in 1940?

A. Right.

Q. And the only one of them that is on file with the Interstate Commerce Commission is Whitaker's No. 6—I. C. C. No. 6—as of June 30, 1937?

A. Well, Whitaker has another tariff.

Q. With the I. C. C.?

A. With the I. C. C., that went into effect, I think it was, August or September, 1937.

Q. Any part of it used in this?
A. Yes—let us see.
Q. How much of the total?
A. Let us see if it is here (referring to data). Here, yes, here is Whitaker's filing (showing document to Counsel).
33466 Q. Was that the September or June, 1937, filing?
A. This is August 26, 1937.
Q. Is that one of two, or one of three filings by Whitaker of the I. C. C.?
A. Well, we had one, and this is the second one.
Q. So there were two, and this is the second; is that right?
A. Yes.
Q. Do you have with you the contracts carrying the schedules of rates upon which the remaining parts of this Respondents' Exhibit 2390 are based?
A. Well, here is Louis Meyers, April 27, 1937 —Fred Schwerman I did not use (referring to documents)—

33469 Washington, D. C.,
Thursday, February 29, 1940

33470 I notice that on the record of January 25, 1940, it shows Respondents' Exhibit 2191-A to Z-12; this should be Respondents' Exhibit 2191-A to Z-13.
(The document previously marked "Respondents' Exhibit 2191-A to 2191-Z-12," was re-marked as "Respondents' Exhibit 2191-A to 2191-Z-13.")
Trial Examiner Norwood: Mr. Dewey T. Meyers is recalled to the stand for a continuation of his examination.
Mr. Smith: Mr. Examiner, we were asked yesterday to supply the number of the invitation on the sales that were made in Detroit as to which there is proof of shipment to Alpena and other points.
I have this morning a telegram from Charley McCarty, giving me that information.
"June 24, 1938"—I assume that is the date—"Invitation 13046, Contract ER-TPS-51-7771-PO 51-35366
33471 R. W. Clark."
Signed "C. McCarty."
Mr. MacIntyre: Mr. Smith, the information that you have just given to the Reporter, is that the information

that relates to the transaction about which the witness yesterday testified after refreshing his memory and recollection from Respondents' Exhibit 2386; that is, the shipment by W. P. A. of 160 barrels of cement from Detroit to Alpena?

Mr. Smith: That is right.

Mr. MacIntyre: On June 28, 1939?

Mr. Smith: That is right. And I hope that the source of the information will preclude objection to its authenticity and correctness.

DEWEY T. MEYERS thereupon resumed the stand and testified further as follows:

Direct Examination (Continued) by Mr. Smith.

Q. Mr. Meyers, I want to direct your attention 33472 to a situation as to prices around Toledo, Ohio, for truck and rail delivery. My memory is that is occurred in 1932,—of which there was a differential between them. Can you refer to your memorandum there and tell us what you remember about that?

A. (Referring to data) March 28, 1932, Huron published prices in a territory surrounding Toledo consisting of a circle of 20 miles around the plant, using the truck rates to make delivered prices by truck, and the rail rates to make delivered prices by rail. At the same time, in the territory between 20 miles and 40 miles, they made prices for both car and truck delivery based on the rail rates.

Q. In that 20-mile zone, was there or was there not a differential between the price for rail delivery and the price for truck delivery?

A. Yes; there was.

Q. Was it constant, or can you give an illustration of what it was?

A. The difference was the difference between the rail rate and the truck rate.

Q. But have you one of the rates there, so that you can tell us what that difference was on just one location?

A. On the first 10 miles we made a truck price of $1.61, that was using an 11-cent truck rate.

Q. What would be the rail price there?

A. I have not the exact figure, but it would be about $1.75.

33473 Q. What, if anything, did competition do as to those prices?

A. On March 31, 1932, Medusa quoted the same as Huron did at Toledo.

Q. Was that or was that not a reduction in their price?

A. That was a reduction in their price.

Trial Examiner Norwood: That was a reduction that met, apporximately, the difference in the rail date?

The Witness: You mean as Huron issued?

Trial Examiner Norwood: Yes.

The Witness: Yes; the difference in the truck price and the rail price.

By Mr. Smith:

Q. At that time was the difference in the rail price and the truck rate, to get away from Toledo and out in the territory—

Trial Examiner Norwood: And then that was—

Mr. Smith: Pardon me.

Trial Examiner Norwood: Was that a reduction in price? You are supposed to be giving here these various reductions in price. Now, is it of any interest to give the various changes of prices that were made merely to meet changes in freight rates? Does that have any bearing whatsovere on the question of competition?

Mr. Smith: This witness did not answer my question exactly. When I asked him the question about what the price was, I was directing it to the points outside of
33474 Toledo. He started in talking about Toledo, but what I wanted to bring out was that they made a price outside of Toledo at, say $1.60 for truck delivery and $1.70 for rail delivery, whereupon competition immediately cut their rail delivery price to meet the truck price—lowering their rail price to meet the truck price.

By Mr. Smith:

Q. I am talking about a point to which, outside of Toledo, there was a truck and rail price.

A. Yes.

Q. What did competition do about that?

33475 A. On April 4, 1932, Wabash quoted f. o. b. cars in that area at the same price that Huron had made for truck delivery.

Q. And then, following that, what did you do, if anything, Mr. Meyers? Well, did you or did you not reduce

your rail price to meet the truck price? You can answer that without looking it up.

A. Yes; we were forced to reduce our rail price.

Trial Examiner Norwood: Do you mean f. o. b. cars at destination?

The Witness: At destination, yes.

Mr. Smith: That is all. Take the witness.

Was Respondents' Exhibit 2390-A to F received?

Trial Examiner Norwood: I think it was.

Mr. Withrow: 2390 was offered. I do not remember whether it was received.

Trial Examiner Norwood: Was there any objection to Respondents' Exhibit 2390-A to F?

Mr. MacIntyre: Yes. We object to it on the ground that it is immaterial, irrelevant, and incompetent to the issues in this case.

Mr. Smith: That was the seedule of rail and truck rates covering our territory. I think that is quite important.

Trial Examiner Norwood: I want to know just what the purpose of that is.

33476 Mr. Smith: The purpose of that is to show why we used the trucks. It demonstrates on its face—

Trial Examiner Norwood: It demonstrates on its face—or does it go to show that the truck rates could be regulated so as to be a definite and determinable factor? Is that it?

Mr. Smith: It shows that they are regulated and are a determinable factor.

Trial Examiner Norwood: Since when?

Mr. Smith: Since 1932 and 1933.

33483 Trial Examiner Norwood: Respondents' Exhibit 2390-A to F is received as marked.

(RESP. EX. 2390-A to 2390-E, was offered and received in evidence.)

Mr. Smith: I make the further offer that if there is any further question about them, we will transmit the original invoices showing the payment of those charges.

33484 *Cross-Examination by Mr. MacIntyre.*

Q. Mr. Meyers, you knew Mr. S. T. Crapo, of the Huron Company?

A. Yes, sir.

Q. He was general manager?

A. Yes, sir.

Q. You do not know how many conferences he had with his competitors before each of these price changes was announced by them and by your company; do you?

A. Never knew what Mr. Crapo was doing, except when he was in my office.

Q. He was the policy man, though, that really ordered price changes which you made; is that not correct?

33485 A. I got my instructions from the sales manager.

Q. And you understood that those instructions came to you from him, after he had conferred with Mr. S. T. Crapo; is that correct?

A. No.

Q. Well, don't you know as a fact that he did confer with Mr. S. T. Crapo before passing to you the instructions for price-changes?

A. No, sir.

Q. You don't know as a fact that he ever conferred with Mr. S. T. Crapo concerning those matters?

A. Not to my knowledge.

Q. Did you ever confer with S. T. Crapo, the general manager of your company?

A. At times.

Q. Concerning matters of price changes?

A. Not that I can recall.

Q. What did you confer with him about?

A. Why, usually, we were talking over old days in the railroads.

Q. You did not discuss company business with him, although he was general manager?

A. Occasionally.

Q. Well, what was the company business that you did discuss with him?

33486 A. Freight rates.

Q. You did not discuss prices, as such?

A. No.

Q. Either base prices or delivered price quotations, or anything of that kind?

A. No.

Q. All of your discussions with other members of your company of that nature, you had with the sales manager; is that correct?

A. That is right.

Q. And you do not know with whom he discussed those matters before he discussed them with you?

A. No.

Q. And that sales manager is Mr. Rooney?

A. Right.

Q. You have given considerable testimony about delivery to trucks at your mill. Will you tell us now, Mr. Meyers, the date on which you last delivered to truck f. o. b.; that is, to the dealers' trucks f. o. b. your plant in Buffalo, without any restriction on that dealer as to where he would carry the cement, the delivering being made at an f. o. b. plant price?

A. I don't believe I could answer that.

Q. Well, give us the approximate date.

A. May I have the question again, please?

Trial Examiner Norwood: Read it.

33487 (Question read.)

A. Well, if the dealer was at our Buffalo plant today with his truck, I would say today.

By Mr. MacIntyre:

Q. What price would you sell him at your Buffalo plant today for delivery to his trucks there?

A. The same as delivered price.

Q. At his destination?

A. At his destination.

Q. How long has that practice or policy of your company with respect to sales at that point prevailed?

A. Probably some time in 1933.

Q. You say destination—

Trial Examiner Norwood: That was destination price, with no freight allowances?

The Witness: That is right.

By Mr. MacIntyre:

Q. When you say destination price, you mean, of course, the destination price as quoted for carload delivery at his destination; is that correct?

A. Truckload delivery to destination.

Q. Is there any difference in quotations for carload delivery at his destination?

A. No.

Q. What was the restriction, if any, that was

33488 placed upon delivery to the dealers' truck at your Buffalo plant previous to 1933?

A. I don't remember.

Q. Do you know whether or not the policy is any dif-

ferent, or has been any different over that period at each of your other plants, from the policy followed at Buffalo?

A. Yes.

Q. Well, we will take them plant by plant. Can you tell us the dates on which your company last made deliveries to trucks; that is, to dealers' trucks at your Cleveland plant at prices f. o. b. that plant, without any restriction on the dealer?

A. If there is a dealer's truck at our plant this minute, being loaded with cement, that is the time.

Q. At what price would you sell him?

A. Somewhat lower than the delivered price in Cleveland.

Q. How much lower?

A. Probably 20 cents a barrel, or something like that.

Q. How did you arrive at that?

A. I don't arrive at it.

Q. Who does?

A. The sales manager.

Q. Do you know how he arrived at it; he has never told you how he arrived at it?

A. No; he just tells me what to price the tickets.

Q. That is more or less an arbitrary price for
33489 the Metropolitan District of Cleveland for truck delivery; is it not?

A. For the entire Cleveland trucking area.

Q. How long have prices of that nature prevailed?

A. Off and on, for many years.

Q. Well, you say "off and on." Will you please clear that up?

A. Well, I can go back as far as 1930.

Q. All right.

What was the policy of the company in delivering to dealers' trucks in 1930; at what prices were they selling?

A. They sold at the destination price f. o. b. the plant with the rail rate allowed as trucking compensation.

Q. How long did that policy prevail?

A. As I recall, some time in 1932.

Q. And what became of the policy when it changed in 1932?

A. I will go back and correct that to May, 1931.

Q. Yes.

A. We just gave them a plant price f. o. b. their trucks.

Q. Without any restriction as to where they would carry the cement?

A. That is right.

Trial Examiner Norwood: Was that your base price there?

The Witness: I think it was.

By Mr. MacIntyre:

33490 Q. How did the plant price that you used there, that you used under those circumstances, for that purpose, compare with the price you have there today for that purpose?

A. Not much difference.

Q. How long did that policy prevail that you inaugurated during May, 1931? That was May 25th, was it not?

A. Yes.

Q. How long did that prevail?

A. Some time in 1932.

Q. Can you give us the exact date in 1932 when it expired?

A. Perhaps I can from these (examining papers). August 10, 1932.

Q. What became of the policy then?

A. The policy was delivered price within a 35-mile radius of Cleveland.

Q. Now, let us see. What you did, then, was to permit the dealer to send his truck to your plant for delivery to his truck, on which you would charge him the rail delivered price quoted within 30 miles to all destinations; is that correct?

A. The railroad delivered price?

Q. As quoted by you and your competitors to all destinations within 30 miles.

A. I don't know what our competitors did, but we quoted the carload price, the same as trucks.

Q. To all points within 30 miles, and that is
33491 what you charged him when he sent his truck to your plant for it; is that correct?

A. Yes.

Q. How long did that policy prevail?

A. Until October 4, 1932.

Q. What effect, if any, did that have upon the volume of trucking from your silo there? Did the volume decrease?

A. I never thought of making that kind of a study.

Q. But some one in your company did make such a study, did they not?

A. Perhaps.

Q. Did you know the result of it?

A. I do not.

Q. Mr. Crapo made it, did he not?

A. I don't know.

Q. What became of the policy on October 4, 1932, with respect to trucking from the plant at Cleveland?

A. The truck delivered price was made 5 cents per barrel higher than the rail price.

Q. For all destinations to which the dealer was to carry it in his trucks from the plant; is that correct?

A. May I have the question again, please?

(Question read.)

A. No.

Q. Well, will you explain what you mean by 5 33492 cents above the delivered price?

A. You said the dealers' trucks. It was trucks hired by us.

Q. Then, you did not permit the dealers' trucks to load for delivery at your plant after October 4, 1932?

A. Oh, yes. Yes; if they came to our plant with their truck they got cement.

Q. At what price?

A. I don't remember what it was at that time.

Q. It was on delivered-price basis to the buyer, himself, was it not?

A. That is what it was when we delivered the cement, but I don't know what we did on the pick-ups at that time.

Q. Well, is it not a fact, Mr. Meyers, that you gave the dealers' trucks no advantage? When they came to your plant you charged the same as if you delivered in your own truck, plus 5 cents?

A. That may be correct.

Q. And how long did that policy continue?

A. January 29, 1935.

Q. There was a considerable drop in the volume of trucking from that plant during that period, was there not?

A. I don't know.

Q. Have you never made a study of it?

A. I have made no study.

Q. Some one in your company did, did they not?

33493 A. I don't know.

Q. Did you handle any of the transactions, or have any of them called to your attention, that went through the Cleveland silo at that time?

A. Shipping tickets all pass through my office.

Q. What do you recall about the volume of it, from your experience with having those pass through your office?

A. The tickets from all the plants pass through my office, and there are so many of them I couldn't begin to recall what happened at any particular time with reference to volume.

Q. You just have no independent recollection concerning the significance of these papers that go across your desk, the shipping papers and sales papers, that pass in such volume?

A. No, I could not pick out any particular time and say to myself, "This was the condition then." I could not do it now.

Q. You really have no independent knowledge, aside from the records, of that?

A. No.

Q. Well, what was the date in January, 1935, that change took place?

A. We mailed our quotations on February 2, 1935, effective February 3, 1935, and made it retroactive to January 29, 1935.

Q. How long did that continue; that is, the policy that you adopted that succeeded that? Is that the policy which is in effect now?

33494 A. Here we are in Cleveland, aren't we?

Q. Yes.

(Witness refers to data.)

A. I don't know the date when—I will say it a little differently: In my mind there is no specific data when we started giving plant prices at Cleveland.

By Mr. MacIntyre:

Q. You mean—

A. Which is still going on.

Q. Well, what was this policy you adopted on February 3, 1935, at Cleveland, for truck delivery?

A. We dropped the nickel.

Q. Just dropped the nickel?

A. Yes.

Q. Continued on the same basis, otherwise?
A. On the delivered basis, yes.
Q. And you do not know how long that continued?
A. No, I can't say when we started on a plant price.
Q. Can you give me an approximate date? Was it after July 2, 1937?
A. I couldn't even say as to that.
33495 Q. Well, this plant price that you talk about being in effect there now, is, in substance, a price that is no different than the flat delivered price for all points in Metropolitan Cleveland, is it—whether by rail or truck?
A. No.
Q. It is the same?
A. No.
Q. Is that correct?
A. No.
Q. Then, what is the difference?
A. The delivered price by rail is higher than the plant prices that we make at Cleveland.
Q. To trucks?
A. To trucks.
Q. And how much higher?
A. Various sums.
Q. How could it be various sums if your plant price is in fact a plant price?
A. Some of our contracts are taken at—there is a variation in the price of the contracts which we take at the plant.
Q. Well, we will come back to the trucking price. The trucking price at your plant is no different than the truck delivered price for all points in Metropolitan Cleveland, is it?
A. It is lower.
33496 Q. How much?
A. Around 20 cents a barrel, I guess.
Q. A flat 20 cents a barrel?
A. No.
Q. Irrespective of the differences?
A. No.
Q. Well, tell us what it is.
A. It would vary according to the rail rate from Cleveland.
Q. I am talking about to the points within Metropolitan Cleveland, now.

A. Well, I still say it is about 20 cents a barrel cheaper.

Q. Well, what is the price—we have figures in the record here showing what the delivered price in Cleveland and all these plants is, so will you give us your plant price so that we can tell from the record, then, what difference, if any, exists?

A. Well, one of them that I recall is $1.99.

Q. Your charge your customer $1.99 when you load his truck at your plant in Cleveland; is that correct?

A. Yes.

Q. Is that in paper or cloth?

A. In cloth.

Q. In cloth?

A. Yes.

Q. And he can carry it to any point in Cleveland
33497 that he wants to?

A. In Cleveland, yes.

Q. Can he carry it to any point outside of Cleveland, if he wants to?

A. We don't know what becomes of it.

Q. Is your policy in Cleveland any different for the various periods that you have talked about than it is and has been in Toledo?

A. Yes.

Q. Well, was there any difference for that period of May 25, 1931, to October 4, 1932?

33498 A. (Referring to data.) I don't quite understand the question.

33499 By Mr. MacIntyre:

Q. I merely asked, Mr. Meyers, whether or not that the policy with respect to delivery to trucks by your company was any different in Toledo from the policy you had in Cleveland for the period beginning May 25, 1931, and ending October 4, 1932.

A. There is some difference.

Q. What are the differences?

A. (Referring to data.) The differences, as I recall, are principally changes in the limits to which truck delivery was given.

Q. But your conditions and method of pricing was no different, was it, during that period?

A. Yes, I cited this morning that at Toledo we tried to use the truck rates, and that method failed—that was a difference.

Q. Well, I know, but that was about on a delivered-price basis, though, for all the destinations involved, was it not?

A. Yes, that was delivered price.

Q. Yes; we have a delivered price in Cleveland, and you have a delivered price in Toledo for a truck delivery over that period.

Now, is there any difference in the policy with respect to delivery to trucks at Cleveland and Toledo during the period of October 4, 1932, and February 3, 1935?

A. (Referring to data.) No, I think we dropped 33500 the nickel at the same time at both plants.

Q. So the policy was the same; is that correct?

A. Yes.

Q. Now, has there been any difference in the method of pricing since, in either of those two places, since February 3, 1935?

A. Yes.

Q. What are they, and over what period do they exist?

A. Well, we brought out that at the present time we got a plant price at Cleveland, but none at Toledo.

Q. Well, can you tell me—has there been a change in the Toledo policy since February 3, 1935?

A. (Referring to papers.) On February 3, 1935, we went to the truck price, the same as rail price.

Q. At destination?

A. At destination, and that method had not been changed.

Q. Well, what differences, if any, have existed in the policies used by your company for delivery to trucks at Detroit from those used at Toledo, beginning with this period of May 25, 1931, if you adopted any policy in Detroit as of that date?

A. The policy has been different in one respect particularly, and that is that we have never had the five-cent differential in Michigan.

Q. But you have had, throughout the period 33501 since May 25, 1931, sold on a delivered-price basis?

A. Yes, I think that was March 10, 1933, when we went on the delivered basis.

Q. Well, what was the policy in Detroit between the dates of May 25, 1931, and March 10, 1933?

A. We have plant price.

Q. And what plant price did you use for delivery to trucks of your customers?

A. It was lower than the delivered price.

Q. But it was not the same as your base price at your other plants, was it?

A. We have never had a base price at our Detroit plant.

Q. Well, I said other plants.

It was never as low as the base price at your other plants?

A. Yes, I believe we had this—now, just a moment: our quotations that we sent out at that time read: "F. o. b. our trucking platform our nearest plant."

Trial Examiner Norwood: And that was the same as the base price at that point?

The Witness: Yes, sir.

By Mr. MacIntyre:

Q. Which, of course, was translated into a delivered price, wasn't it?

A. I beg your pardon? May I have that, please?

33502 Trial Examiner Norwood: Read it.

(Last question read.)

A. By truck, you mean?

By Mr. MacIntyre:

Q. Yes.

A. No, we never translated it into a delivered price.

Q. We are still talking about the period from May 25, 1931, and March 10, 1933, are we not?

A. Yes.

Q. During that period you used a base price as a price for truck delivery to your customers in Detroit?

A. Yes, a plant price.

Q. Without any restriction as to where the cement was to be carried by your customer?

A. That's the way it worked out.

Q. Well, I didn't ask you that. I asked as to whether or not there was any effort or intention on your part, under those conditions, to impose a restriction as to where the customer could carry the cement.

A. I don't know, personally.

Q. Were not situations such as this John R. Fuel & Son involved in that period of time?

A. Oh, yes, now that you mention it.

Q. So it was your intention not to permit truckers, or

dealers with trucks, to come into your plant and get
33503 it and peddle it to places other than their places of business; isn't that correct?

A. When the truck left our plant we didn't know where he was going.

Q. Yes, I know, but it was not your intention to sell to him if he carried into other areas than those in which his warehouse was located, or place of business?

A. I know that they did it.

Q. Well, I know—

A. John R. did it.

Q. But that is not an answer to my question.

Trial Examiner Norwood: What was your policy in that respect? Would you sell to a man whom you knew was going to take in outside of the district, sell flat f. o. b. mill price?

The Witness: I believe not.

By Mr. MacIntyre:

Q. That is the reason why you dropped the John R. Fuel & Supply Company as a customer, is it not?

A. That is right.

Q. And you treated others similarly that you found engaging in such practices; is not that correct?

A. That was a matter of discretion with the sales manager.

Q. But it became more or less the policy of the company, did it not, as you know it?

33504 A. Frankly, I don't know what the sales policy is in that respect, outside of trying to give our customers the service that they warrant.

Q. You did not have anything to do with the formulation of the policy?

A. No.

Q. Mr. S. T. Crapo formed the policy; did he?

A. I don't know.

Q. Have you ever sold for delivery to your customers' trucks at your plant at Wyandotte and Alpena, Mich.?

A. Yes.

Q. On plant price?

A. Yes.

Q. What prices did you charge your customers when they came to Alpena and Wyandotte for cement?

Mr. Smith: Are you asking for prices in dollars and cents? Are you asking the question in that way?

Mr. MacIntyre: Yes.

Mr. Smith: Well, over a period of time, seven years, that is a hard question to answer.

Mr. MacIntyre: The witness refreshed his memory and recollection from any of these papers yesterday afternoon, and he can do that now, and he can give us the time, as well as the amount. We want to know what the facts are.

A. Prior to May 25, 1931, at Wyandotte, we were
33505 selling on destination price f. o. b. the plant, with the rail rate allowed as compensation.

By Mr. MacIntyre:

Q. That was the same as the basing-point price figured back, then, from destination; is not that correct; that is, you were allowing the freight from the basing point, plus the freight price to destination?

A. It could work that way; yes.

Q. Well, is it not a fact that it did work that way, when you allowed——

A. It did at Wyandotte.

Q. What about Alpena?

A. At Alpena the home town boy just come and got it, and we gave him a price on it. I don't remember what it was.

Q. It was higher than the base price there, though, was it not?

A. I don't recall that it was.

Q. Well, what is your best recollection on it? Don't you have something that you can refresh your memory and recollection from and tell us exactly?

A. No; I have nothing here that would help me answer that question. It was not the delivered price. I can say that. It was lower than the delivered price, if any deliveries were ever made.

Q. But is it not your recollection that it was as
33506 as low as the base price?

A. To some customers, yes.

Q. But generally no?

A. Not generally no.

Mr. Smith: What do you mean—"Not generally no"?

Mr. MacIntyre: Let the witness state what he means.

Mr. Smith: Yes; tell us.

A. Most of the people around Alpena got the low price, and then there were two or three manufacturing concerns, home town boys and friends, that got—oh, maybe 5 cents or 10 cents a barrel higher than that.

By Mr. MacIntyre:

Q. The dealers from the Soo and Petoskey, did they come over and get the plant price from you at Alpena for delivery to their trucks at Alpena?

A. They never tried it.

Q. Well, what was your policy in that respect?

33507 Trial Examiner Norwood: Read it.

(Question read.)

A. As far as I was concerned, we did not have any policy.

By Mr. MacIntyre:

Q. Was it not your policy not to sell to dealers outside of Alpena for truck delivery; that is, for delivery to their truck at your mill?

A. Oh, we sold people outside of Alpena at the Alpena mill on their trucks.

Q. Well, where were they from?

A. Oh, such hinterland points as Boyne City.

Q. What prices did you sell to dealers in Boyne City when they sent their trucks to Alpena for delivery to their trucks from you—for delivery to their trucks at your plant?

A. I don't recall what the prices were, but I think they got the same price as the Alpena dealer.

Q. How do you reconcile your policy in that respect with the policy adopted by your company in dropping the John R. Fuel & Supply Company, down at Royal Oak, in coming to your plant, getting cement, and peddling it out after getting it in trucks?

A. That was not my policy.

Q. You just did not have anything to do with it; is that correct?

A. I got my instructions from the sales manager.

Q. Can you tell us when you last delivered to

33508 trucks of dealers at Wyandotte and at Alpena at a plant price, without any relation to a delivered price?

A. March 10, 1933.

Q. What?

A. March 10, 1933.

Q. Since then it has been on a delivered price basis?

A. Delivered price basis.

Q. Whether he sends his trucks or whether you deliver it in your hired equipment; is that correct?

A. That is right.

Q. Is your policy at Milwaukee any different from that?

A. No, it is not.

Q. What about Duluth?

A. It is different at Duluth.

Q. Do you sell to dealers at Duluth?

A. Yes, sir.

Q. To whom?

A. Duluth Builders' Supply Company.

Q. They are sold through Cutler Magner Company there, are they not?

A. I wouldn't say through Cutler Magner Company. It is sold by Cutler Magner Company for the Huron Portland Cement Company.

Q. Do you control the sales policies of the Cutler Magner Company in that respect?

33509 Q. Do you make sales to any number of customers in Duluth from your silo in Duluth, Mr. Meyers—I mean, does your company make sales?

A. Why, yes.

Q. How many?

A. Innumerable sales; that is handled by our representatives Cutler Magner Company.

Q. Well, do you make any sales other than those—that is, out of Duluth—other than those that are handled through that company; that is, the Cutler Magner Company?

A. No.

Q. Sales handled by that company are handled by the company as your agent?

A. As our sales representatives.

Q. Well, as agents of the Huron Company; is that correct?

A. I presume you could use the word "agents."

Q. Under what terms and conditions are truck deliveries made by Cutler Magner Company to customers' trucks from your silo in Duluth?

A. What little trucking there is around Duluth
33510 the customers come to our plant with their trucks.

Q. At what prices are sales made to the trucks of customers?

A. At a price lower than the carload delivered price in Duluth.

Q. How much lower?

A. Well, of course, that would vary, depending upon the time and the price structure.

Q. Well, it is as much lower than the Duluth price as the Steelton base price is lower than the delivered price?

A. I don't believe I understand the question. May I have it, please?

Trial Examiner Norwood: Read it.

(Question read.)

A. I don't belitve I know what you mean.

By Mr. MacIntyre:

Q. I will try to put it in other language.

Is the price at which sales are made to customers for delivery in trucks at your silo in Duluth as much lower—or, I will put it this way: Are those prices equivalent to the Steelton base price?

A. No.

Q. What, if any, relationship do they bear to the Steelton base price? Are they higher, and if so, how much?

A. The amount has varied at different times, but 4
cents a barrel, I believe, is the difference that I can
33511 reconcile in my own mind now.

Q. That is, 4 cents higher than the Steelton base price?

A. That is right.

Q. And when did that policy of pricing originate?

A. I don't know.

Q. Has it been in vogue as low as 5 years?

A. By "policy," I assume that you mean method?

Q. Yes; the policy you used, or method.

A. It is awful hard for me to follow the prices at Duluth at times.

Q. Well, I do not mean just to follow the prices as they may have changed, if any, but the policy or method of making them. Has it changed in 5 years?

A. I think it has been somewhat the same during the past 5 years.

Q. What policy was in vogue there on May 25, 1931?

A. I don't recall.

Q. Don't you recall whether or not there was a change made on that date?

A. No, I do not.

Q. Do you recall whether or not a change was made on October 4, 1932?

A. No, I do not.

Q. Or on February 3, 1935?

A. No, I do not.

33512 Q. Well, this policy that has been in vogue for several years for selling to dealers for truck delivery at Duluth—at the Huron Portland Cement Company silo at Duluth—has that been restricted to sales to dealers in the Duluth-Superior district?

A. I really don't know.

Q. You don't know that your company has sold for truck delivery from its silo in Duluth to dealers outside of Superior and Duluth, do you?

A. Yes, dealers outside of Duluth have come to the Duluth plant at times for cement.

Q. In their own trucks?

A. In their own trucks.

Q. At what prices did you sell them?

A. If I remember correctly, it was on the destination price f.o.b. the plant with freight allowed; rail rate.

Q. Over what period of time did that policy prevail?

A. That, I can't say.

Q. It was just about the same period that such a policy prevailed at Cleveland, was it not?

A. I don't know.

Q. Mr. Meyers, you have told us on direct that your company sells to customers at f.o.b. plant prices at these various plants.

Does it sell at plant prices, or was it its policy
33513 during June, 1937, to sell at plant prices other than as you have described sales to trucks; that is, on a delivered-price basis with freight allowed to the destination?

A. Generally, when a customer comes to our plant with his own truck he gets the delivered price at the plant.

Q. He can take—that is what you meant by f.o.b. plant price, then?

A. (No response.)

Q. In other words, when he sends his truck to your plant for cement, you give him a plant price, but it is the same price that he could get the cement delivered to him at his destination; isn't it?

A. That's right.

Q. That is what you meant by plant price as you used it in your direct testimony; is that correct?

A. After we went on the delivered basis.

Q. And you have given us the dates on which you went on the delivered basis?

A. Yes.

Q. And the same policy applies if a dealer, or any other customer, wants to buy f.o.b. the plant for railroad car delivery; isn't that correct?

A. With certain exceptions, the cement sold in carload lots is sold on a delivered basis.

Q. So if a dealer at Lansing, Mich., or any other
33514 customer in Lansing, Mich., desires to buy f.o.b. your plant, you would sell him f.o.b. your plant, but would charge him the delivered price in Lansing, car or truck delivery; is not that correct?

A. I misunderstood your pronunciation of "Lansing" there originally. I thought you said "lands in Michigan."

Q. Lansing, Mich.

A. Yes, that is true.

By Mr. MacIntyre:

Q. So when you spoke of f.o.b. plant prices in your direct testimony, that is what you meant?

A. After the period that we went on the delivered basis?

Q. Yes; you have given us all those dates this morning and yesterday as to the time you went on the delivered basis with respect to truck delivery, and so forth.

A. Yes.

Q. And you have also been on the delivered basis with respect to railroad car delivery.

A. With certain exceptions.

Q. That is especially true in quoting prices.

A. To the general trade; yes.

33515 Q. Now, Mr. Meyers, referring to Respondents' Exhibit 2390-A to F, the trucking rates that appear on that exhibit are those that were taken from contracts that your company entered into with various trucking companies, the names of which appear on 2390-F, beginning with the words, "Michigan Transportation Company."

A. These are the rates that we pay those trucking companies; yes.

Q. Now, I will ask you this: Are the rates filed by those trucking companies with the Commission and the State of Michigan the lowest trucking rates on file for the movement of cement between the points indicated?

A. No; each trucking company has its own rates on file.

Q. You would say, then, that you have not secured the lowest rates that are on file, used by your company through this contractual relationship?

A. Up to now, I have not been interested—

33516 A. That is, my interest in what anyone else is paying trucking companies has not been great, and I have not taken the trouble, personally, to go to Lansing to determine what anyone is paying their truckers, because we pay our truckers what they need to maintain their standard of equipment to serve our trade efficiently.

By Mr. MacIntyre:

Q. You have not, then, on a competitive basis, secured from the trucking companies the lowest possible rate between any two given points for the movement of cement?

A. No.

Q. You do not know, then, how much higher some of these trucking rates that appear on Respondents' Exhibit 2390-A to F are over the lowest rates on file?

A. I do know this much, that the trucking rates 33517 which we pay to our truckers are, in some instances, higher, and in some other instances lower than other trucking rates in Michigan.

Q. But the point I was raising is: You do not know but what if you shopped around, you could have secured lower trucking rates for each of the points shown on Respondents' Exhibit 2390?

A. We were not interested in shopping around, because we had the type of carrier serving us where cost of transportation was not as material as the service he could render. We wanted our trucker to maintain a very high standard of service.

Q. You say you were not interested in shopping around. The fact is that you did not shop around in an effort to get the lowest rate; did you?

A. No.

Q. And, of course, the trucking rates are not fixed by

law at any particular level between any given points for the movement of cement?

A. Not any more than rail rates are.

Q. Well, they are not fixed as much as rail rates are for a contract carrier?

A. I cannot make that kind of a comparison.

Q. Well, we are talking about what is shown on Exhibit 2390.

A. And how much—

Q. The contract carrier rates, are we not?

33518 A. Yes.

Q. So you have compared carrier rates there with common carrier rates by rail, have you not?

A. Yes.

Q. So you say you cannot make a comparison.

A. No.

Q. Just now—

A. Just a moment. Let me go back to that. You asked me if the trucking rates were fixed by law.

Q. That is; the contract rates.

A. And not to the same extent that rail rates are. Now, the rail rates in C.F.A. territory, particularly in Michigan, are not fixed by law. Neither are the trucking rates fixed by law on cement.

Q. There is a less limitation placed on contract truckers' rates in Michigan than on common carrier rail rates; is not that true?

A. May I have that question again, please?

33519 A. No, it is not, if you mean by law.

By Mr. MacIntyre:

Q. Is it not a fact that the only requirement that the State of Michigan makes upon contract trucking carriers is that the rates that they contract to give on shipments be on file?

A. That is not correct.

Q. What are the restrictions that are placed on them?

A. Approximately the same as the railroads. The Michigan—

Q. Well, give us the restrictions that are placed on trucking rates per barrel of cement by the Michigan State Commission.

33520 A. The Michigan Public Service Commission, under the truck law, has the power to investigate the rates of all common and contract carriers in Michigan.

Q. For what purpose?

A. Upon complaint.

Q. To determine whether or not they are filed—the rates being used are actually on file?

A. I don't quite understand it.

Trial Examiner Norwood: Read the question.

(Question read.)

A. No, no.

By Mr. MacIntyre:

Q. Well, what are the investigations for?

A. To determine levels of rates, if necessary, upon complaint.

Q. And not to fix them?

A. Yes; they can fix them.

Q. At what level is the Commission in Michigan empowered to fix the contract truckers' rates?

A. Gosh; I have only read the Michigan law once.

Q. Well, you have stated that there are certain limitations imposed by that law. Let us know what they are.

33521 A. I know this much, that the Michigan Public Service Commission is empowered to fix truck rates.

By Mr. MacIntyre:

Q. Have they ever fixed any?

A. No—that is, not on cement.

33522 Q. And never taken any steps to fix rates on cement, have they?

A. There is proceedings before the Commission right now involving a general investigation of all intrastate contract carrier rates, Docket D-3095.

Q. Your company, as a cement manufacturing company, is one of the interested parties in that, is it not?

A. We have been.

Q. In an effort to try to get them standardized?

A. Not necessarily that.

Q. Well, for what purpose?

A. We are interested in what the Commission might set as a basis of rates, if it is going to be too low to enable our carriers to operate efficiently, we want to protect our carriers, or if they are—

Q. You are interested in it, then, from the viewpoint of seeing that rates are fixed by the Michigan Public Service Commission at such a level as will permit people that you

enter into contracts with to haul your cement to make a profit off of it; is that correct?

A. To make a profit off of it? No; to give service to our customers.

Q. Well, aren't you interested in this proceeding for the purpose of seeing that those people that you enter into contracts with get a profit off of the hauling of your cement?

33523 A. I have dropped my interest in the case.

Q. Well, when you were interested in it, was that your interest?

A. My interest was not to squeeze the rates down, but to maintain a level of rates which would permit our carriers to operate efficiently and maintain a standard of equipment which would attract—equipment and service—which would attract customers.

Q. And to permit them to make a profit; isn't that correct?

A. Permit the trucking companies to make a profit.

Q. Yes.

A. Of course, we want them to make a profit.

Q. Off of the cement that they haul for you?

A. Yes.

Q. Now, Mr. Meyers, do you know of a fixed—of trucking rates by a public service commission, in any State in which you ship cement by truck?

A. Yes.

Q. What States?

A. Wisconsin.

Q. Any others?

A. I believe not.

Q. Are the rates in Wisconsin fixed as to contract carriers?

A. Yes.

Q. Minimum rates?

33524 A. If I remember correctly, minimum and maximum.

Q. And was your company interested in seeing that minimum rates were established in that State?

Mr. Smith: May it please the Examiner, I renew my objection to this testimony as to occurrences long after the filing of the complaint in this case.

Mr. MacIntyre: Well, the date has not been fixed, so I will drop it.

Trial Examiner Norwood: Yes.

Mr. MacIntyre: If we understand that that is a fact.

Trial Examiner Norwood: Yes.

Mr. MacIntyre: And I will take it as you stated that it is a fact that Wisconsin fixed its rates, minimum rates on trucking, after the complaint in this case was filed.

Mr. Smith: It was last year that the proceeding was taken.

Trial Examiner Norwood: Yes.

Mr. MacIntyre: So then the record should show that no State, within the knowledge of this witness, had trucking rates fixed up to the time of the filing of the complaint in this case.

Mr. Smith: The record so shows, and it shows that prior to the filing of the complaint in this case
33525 trucking rates were on file so that anyone could obtain the information as to what they were.

Mr. MacIntyre: But were not fixed in any State.

Mr. Smith: I do not know what you mean by "fixed." We have shown, ourselves, that the trucking rates were on file, anybody could ascertain them; they were definite; but we have not shown and do not claim that any State authority has by an order specifically determined rates. We think that that is entirely immaterial.

Mr. MacIntyre: I think we can drop the line on that representation.

Trial Examiner Norwood: Yes.

Mr. Smith: Surely.

Mr. MacIntyre: An admission by Counsel for the Respondent.

Trial Examiner Norwood: All right.

Mr. Smith: What was that last statement?

Trial Examiner Norwood: Read it.

(Record read as follows:

"Mr. MacIntyre: I think we can drop the line on that representation. * * * An admission by Counsel for the Respondent.")

Mr. Smith: I made a representation, but I made no admission.

By Mr. MacIntyre:

33526 Q. On direct, I believe that you stated that your company had used to a small degree the freight rate books of The Cement Institute,—am I correct in that, Mr. Meyers?

A. I used them, personally.

Q. For what purpose?

A. I used their alphabetical list of stations instead of going to "Leland's open and prepay," and picking them out of all the 48 States, Canada, and Mexico. I used them to make up my geographical lists.

Q. I believe you also stated that you had used them for the purpose of checking rates that were being used by your competitors in and near Muskegon, shortly after that point was opened for shipment of cement from that point?

A. I don't believe that I made that statement.

Q. Well, is that the fact?

A. It is not. I received their supplement to the book four days after we had mailed out our quotations.

Q. And you did use the supplement to their book for checking the rates used by your competitors in the Muskegon district on that occasion?

A. No, I don't think I did—no, I know I didn't.

Q. You have never checked any rates from The Cement Institute freight rate books with any official tariffs or compilations of freight rates?

A. Yes, I have checked freight rates but I never 33527 checked them for use in making any prices. I used the freight rates that I checked from the railroad tariffs.

Q. Well, when you say that you used the books of The Cement Institute, the freight rate books of The Cement Institute, for checking rates, on what occasions and against what rates did you use them for checking?

A. I used them very seldom. I would like—let me start back a little bit there and maybe I can give you a better picture of it.

Freight tariffs are complicated structures at times. They are subject to individual interpretation in a great many cases. When during the Code period I would find a filing that did not jibe with the price as I calculated it, I went to the railroad tariff and checked my own rates, and if I checked the same as I did before, from the railroad tariff. I did look at what they had in the Institute book, and during that time I did write to The Cement Institute and called their attention to the fact that their rate was wrong.

Q. In the instances where you found that their rate was wrong, did you use the rate that they had in there for your coding period?

A. I used our rate.

Q. Even though they used a different rate in their coding period, you did not use it; is that correct?

A. That's correct.

33528 Q. Suppose that the use of that wrong rate by them gave them the lower price, what happened then?

A. We just met the price as we found it in that town.

Q. So, in effect, you did use their rate,—wrong rate?

A. No.

Q. In the quotation of the price, then?

A. No, we used their delivered price.

Q. Which was figured on a wrong rate from their freight rate books; is that correct?

A. No, I wouldn't say so. We made a price.

Q. Well, you found in such instances that a wrong rate did apply from the applicable basing point to the point where they had quoted such a price, didn't you?

A. No, we got it off the filing from receipt of the Code Authority.

Q. What?

A. We got it from the filing of the Code Authority.

Q. And you found that the freight rate in The Cement Institute freight rate book, showing a rate from the applicable basing point to such destination filed price was an erroneous rate in some instances, I believe you said?

A. In some instances, yes; and in other instances I never even bothered to look at The Cement Institute book.

Q. But in those instances where you found the rate to be erroneous, you went right along and quoted the

33529 price that your competitors had filed for that point, which was the equivalent of this erroneous rate plus the applicable basing point, or the equivalent of it; is that correct?

A. No, we filed our own price, then.

Q. Which was the same as your competitors?

A. Not necessarily.

Q. Well, in most of the instances, that was the case, was it not?

A. Well, in most of the instances that came to my attention The Cement Institute's rate book was wrong.

Q. Well, in most of the instances where you filed prices, you filed the prices that were the same as your competitors?

A. No, not all the time.

Q. You mean that you filed different prices from the prices filed with your competitors?

A. Yes, if we believed they should be different, we filed different prices.

Q. You are willing to rest on the records of The Cement Institute as to what prices it had filed with it by you and your competitors, are you not?

A. Yes.

Q. You would agree that whatever those records show are the correct records, would you?

A. I would if they were the originals from us.

33530 Mr. MacIntyre: Will you mark this for identification, please.

(The documents were marked for identification "Commission's Exhibits 3246-A to 3246-H.")

By Mr. MacIntyre:

Q. Mr. Meyers, showing you Commission's Exhibit, for identification, 3246-A to H, and Respondents' Exhibit 2380, I ask you to state whether or not the Commission's exhibit referred to are some other pages in the same freight rate book of your company that Respondents' Exhibit 2380 is one page?

A. They are other pages of the same. A, B, and C are other pages. That starts on 20, with 2380.

Q. Commission's Exhibit, for identification, 3246-D to H, are other pages of the same freight rate book made up by you in your office; is that correct?

A. They are other pages from our rate books.

Q. Now, referring to the page which is marked for identification as Commission's Exhibit 3246-H, will you tell us what the symbols across the top, beginning with the "Bu" mean and stand for?

A. "Bu" is Buffington; "MC," Mason City; "Stl," Steelton; "Mil," Milwaukee; "Man," Manitowoc;

33531 "LaS," LaSalle, and "GB," Green Bay.

Q. The names of those towns are the names of towns that are basing points; is not that correct?

A. They are the names of towns at which there are cement plants.

Q. Well, those are basing points also, are they not, as you know them in the cement industry?

A. Sometimes "yes" and sometimes "no."

Q. Well, at the time you made up the book what was the case?

A. Yes, they were.

Q. Basing points?

A. So-called basing points.

A. At that time.

A. Yes.

Q. And the figures below their names are freight rates in cents per barrel from those basing points to the destinations, the names of which appear in the first column; is not that correct?

A. They are rates in cents per barrel from those points to the destinations.

Q. The names of which are shown in the first column.

A. That is right, and they are not as published in the railroad tariffs. In other words, they are equivalents of the railroad rates, fractions disposed.

Q. When you say "fractions," do you mean frac-
33532 tions dropped when the fraction is under one-half, and the fraction is added to the full figure when the fraction is over one-half?

A. Yes.

Q. That is, when the fractions appear in terms of cents per barrel.

A. Yes.

Q. They are "disposed."

A. Yes.

Trial Examiner Norwood: I take it, then, when the fraction is over a half, it goes to the full figure.

Mr. MacIntyre: It goes up to the full figure.

Trial Examiner Norwood: If it is one-half it is taken up to one; is that it?

The Witness: Taken to the full figure.

By Mr. MacIntyre:

Q. And when under a half it is dropped back to the next full figure?

A. Yes.

Q. That is, after computation into cents per barrel from the cents fraction per hundredweight?

A. Yes; conversion from hundredweight to per barrel.

Q. Now, when the railroad computes its charges for hauling cement and a fraction per hundredweight is so involved as to give a fraction over and above a full cent

per barrel, there is no dropping or adding of the fraction there, except in the last cent in the total amount
33533 charged for the hauling of the cement in the car; is not that correct?

A. I don't know what you mean, Mr. MacIntyre. I am sorry.

Q. Well, we will probably have to let you illustrate. Take a figure of 10½ cents per hundredweight. That will give you a certain number of cents and a fraction over per barrel, will it not?

A. If my arithmetic is correct, it is 39.9.

Q. Now, when you compute for the purpose of making up this book that you have just been talking about, the pages of which are marked Respondents' Exhibit 2380 and Commission's Exhibit for identification, 3246-A. to H, you would count that 40 cents?

A. I would count that 40 cents.

Q. Per barrel?

A. Yes.

Q. But the railroad, in computing its charge for hauling the cement, would carry the figure 10.5, and multiply that by the number of pounds that are contained in the car, to arrive at the total figure, dropping the fraction that resulted at the end of that computation; is that correct?

A. In order to figure the freight charges, they would multiply the weight.

Q. Ten and a half by the rate in cents per hundred pounds.

A. If the rate in the tariff is stated in cents per hundred pounds.

33534 Q. Well, the railroad tariffs on cement are stated in cents per hundred pounds, are they not?

A. Not necessarily; there are some per ton.

Q. Well, either in tons or in hundreds.

A. Yes.

Q. But where they are stated in cents per hundred pounds, they are carried out just as we have indicated?

A. Yes.

Q. And no fractions are added or dropped, except on the last cent or the fraction of the cent in the final computation of the total freight charge on the car.

A. That is right. The freight charges would come out in dollars and cents.

Q. Let us see the effect on the total as figured by you in this book and as figured by the railroad. You would have, by adding that one-tenth of a cent per barrel, a greater total on the freight charge for that car than the railroad would compute as the freight charge on the car; is not that correct?

A. There would be the same difference there as there would be if we dropped the fraction.

Q. Well, will you answer the question that I asked you; that is, as to whether or not the freight charge as finally computed by the railroad would be less than the freight charge as computed by you?

A. On a 40-cent rate?

33535 Q. Yes.

A. There would be a small difference.

Q. Well, if you take a 50,000 minimum car, how much would that difference be?

A. I would have to get my arithmetic straight here. I wish I knew more about arithmetic.

33536 Q. Mr. Meyers, are you prepared now to answer the question that we put to you just before the noon adjournment?

A. Yes, I have calculated the difference. The 33537 railroad freight would be 52.50, and 50,000 pounds converted to barrels, and multiplied by 40 cents per barrel, results in 52.6312, making a difference of 13.12 cents per car.

Mr. Smith: No.

By Mr. MacIntyre:

Q. That is where the difference is—

Mr. Smith: (Interposing.) Pardon me, Mr. MacIntyre. The witness does not mean that.

You mean a difference of point—whatever you said there—on the 50,000 pounds, do you not?

Mr. MacIntyre: That is the minimum car.

Mr. Smith: Well, he was asked on 50,000 pounds without any reference to the car.

Trial Examiner Norwood: Well, is it computed on a 50,000-pound car?

Mr. Smith: Yes.

Mr. MacIntyre: Yes.

Mr. Smith: If he says that, it is all right.

Trial Examiner Norwood: Yes.

By Mr. MacIntyre:

Q. Now, Mr. Meyers, that computation is based on an addition of a freight of one-tenth of a cent per barrel, through the use of converting to cents per barrel—in converting into cents per barrel—over and above what the computation would be when you carried it out to the carload and computed on the basis of total car—total
33538 car charge of the rates per hundred pounds; isn't that correct?

A. I am afraid I don't quite understand that.

Mr. MacIntyre: All right, I will try to rephrase it.

By Mr. MacIntyre:

Q. The computation that you make where you got the result you just gave us, is one where by converting from the hundredweight rate into the barrel rate, your difference is one-tenth of a cent per barrel, that is
33539 disregarded, which is not disregarded in the computation of the carload charge for freight when computed on hundred-pound rates; is that correct?

A. That's right.

Q. Now, if your difference ran up to as much as four-tenths of a cent—which is possible when you convert to cents per barrel, is it not?

A. It may be possible, yes.

Q. Well, is it not a fact it does run up to four-tenths of a cent when you compute per-hundred-pound rates into per-barrel rates, in many instances?

A. I don't know whether any of them come out to four-tenths, but—

Q. (Showing document to witness.) I will show you Commission's Exhibit 1110-U, the Cement Institute freight rate book for the State of New York, effective August 15, 1935, and ask you to look at the conversion tables that appear on the second and third pages there, and ask you to state whether or not that the fractions dropped in computing the rate in terms of cents per barrel does not run up as high as four-tenths of a cent in many instances?

A. (Examining exhibit.) I can't tell from this; they don't show the fractions on the rates in cents per barrel.

33540 Q. In the first two columns on page 3 you have your rates expressed in terms of hundred pounds; and in the third column—the fourth column you have—no,

in the third column you have—well, in the third, sixth, and ninth columns on that page, you have those rates in cents per hundred pounds converted into terms of cents per barrel, do you not (indicating)?

A. Yes, they have done that here; I think—

Q. In doing so in many instances haven't fractions up to four-tenths of a cent—that is, per barrel—been disregarded or dropped?

A. The way this thing has been made there could be four-tenths of a cent per barrel.

Q. Is it not a fact, as you see it, as an expert freight traffic man—

A. Yes, the way this looks it appears that there could be fractions of four-tenths of a cent.

Q. Now, going back to the problem that you worked out for us over the lunch hour, you got 13 cents, plus, difference in the car; is that correct?

A. Yes.

Q. So that is based upon one-tenth more, so if you run up to four-tenths it would be four times that 52 cents,

33541 or more, on your per barrel—or per car?

A. On a 10½-cent rate or any rate?

Q. On any rate where the fraction of four-tenths is disregarded or disposed of, would be four times.

A. Oh, yes, it is mathematically possible.

Q. That would run you over 50 cents per car, then, instead of 13?

A. That would be possible, yes.

Q. And in a huge order for cement, such as is frequently placed by the Government—that is, an order as large as the one that was placed with your company by the Government for the Fort Peck project of 600,000 barrels, it would run into many dollars' difference, would it not?

33542 A. Well, that would depend on whether you dropped the fraction, or—

By Mr. MacIntyre:

Q. Well, where the fraction is four-tenths of a cent per barrel, and it is dropped, as was the case in this Commission's Exhibit 1110-U, you followed through, and if the order were as large as the one you got from Fort Peck, it would run into several dollars' difference, would it not, between the computed price on this freight rate, arrived at

in that manner, and what the actual freight bill would be; is not that correct?

33543 A. It is a mathematical possibility that there would be a difference if you dropped the fraction.

Q. Are you through with that?

A. Yes, I believe so.

Q. Now, referring to Respondents' Exhibit 2380, Commission's Exhibit, for identification, 3246-F to H, and Commission's Exhibit 1110-U, I will ask you to state whether or not, in the light of the testimony you have given us within the past hour, that you can use such books in accurately determining freight rates, which will actually have to be paid to the railroad, through the use of such books, when the conversion tables are used so as to show the freight rate in terms of cents per barrel?

33544 A. I assume that the same answer would be obtained.

Q. That is, as to either one of the exhibits?

A. Yes; except that this is a New York rate book, and these pertain to other States.

Q. They are both similar, so far as the computation in terms of cents per barrel is concerned; are they not?

A. No.

Q. In disposing of the fraction.

Mr. MacIntyre: Will you read that answer?

(Answer read.)

Mr. MacIntyre: Perhaps you misunderstood the question.

Will you read it back to the witness.

(Question read.)

A. This conversion table is somewhat a mystery to me.

By Mr. MacIntyre:

Q. It gives you the same result as your conversion table, Respondents' Exhibit 2380, though, does it not?

A. I have no conversion table in 2380.

Q. It is all computed in terms of cents per barrel. Can you use the rate that is computed in terms of cents per barrel, such as appears in those exhibits; that is, Commission's Exhibit 1110-U, Respondents' Exhibit 2380, and Commission's Exhibit 3246-A to H, and accurately determine the freight that is to be paid to the railroad on the shipment?

33545 A. I can.

Q. Well, how can you?

A. Because I can back these rates up.

Q. I am talking about the freight rate results that appear in there. I am not talking about the data by which you can back those rates up. I am referring to the rates as they appear there in the converted form.

A. You couldn't do it from the Institute book, nor could you do it from ours.

Q. That is, you could not determine the accurate rate from such converted figures? Is that what I get from your answer?

A. The freight rates in our rate books illustrated by Respondents' Exhibit 2380 and Commission's Exhibit 3246-A, and so forth, could not be used by a greenhorn to figure the freight charges.

By Mr. MacIntyre:

Q. The results as they appear there could not be used by anybody to determine the freight charges, could they? They would have to go beyond the freight rates as they appear there; is not that correct?

A. Yes.

Q. And is it not also true with respect to the data
33546 appearing on page 3 of Commission's Exhibit 1110-U?

A. No, I would not use that book to compute freight charges.

By Mr. MacIntyre:

Q. That is, you are speaking about Commission's Exhibit 1110-U?

A. 1110-U.

Q. And Respondents' Exhibit 2380 and Commission's Exhibit 3246-A to H?

Mr. Withrow: The last is for identification.

Trial Examiner Norwood: Is that right?

A. Myself, personally, with my knowledge of the routes, I would use the rates in Respondents' Exhibit 2380, etcetera,
33547 to compute our freight charges by converting it back into cents per hundred pounds, when I knew that the shipment was going to move over the lowest rated route.

By Mr. MacIntyre:

Q. You would have to know all of that, and still you

would have to carry it back from the conversion table in order to do that, Mr. Meyers?

A. Which conversion table? Do you mean in here?

Q. Yes.

A. I don't use that.

Q. On page 3 of Commission's Exhibit 1110-U.

A. I don't use that.

Q. Well, if you were using it, you would have to drop the use of it in order to determine the actual freight rate, is not that correct?

(Question read.)

A. I have a tariff file that I use for computing freight charges.

By Mr. MacIntyre:

33548 Q. Well, you could not use, though, could you, Mr. Meyers, page 3 of Commission's Exhibit 1110-U as the final result of a computed rate in terms of cents per barrel, for determining the actual rate that the railroad charged for a shipment of cement; could you?

A. No.

Mr. MacIntyre: Thank you.

If Your Honor please, I now offer in evidence Commission's Exhibit 3246-A to H, as the counterpart of Respondents' Exhibit 2380, part of the freight rate book of Respondent, which has been offered here.

Trial Examiner Norwood: The exhibit is received

33549 and marked.

What is that number now?

Mr. MacIntyre: Commission's Exhibit 3246-A to H.

Trial Examiner Norwood: It is received as marked.

(COM. EX. 3246-A to 3246-H was offered and received in evidence.)

33551 By Mr. MacIntyre:

Q. Now, again referring, Mr. Meyers, to Commission's Exhibit 1110-U, to Respondents' Exhibit 2380, and Commission's Exhibit 3246-A to H, can you tell me how you can determine from either one or any of those exhibits the correct freight rate that would apply between any of the points shown in them on a car of 80,000 pounds?

33553 Q. I will ask you again, Mr. Meyers, if you can tell me whether that from the information appearing in Commission's Exhibit 1110-U, and Respondents' Exhibit 2380, and Commission's Exhibit 3246-A to H, that you can

determine, the correct freight that you would have to
33554 pay on a shipment of an 80,000-pound car between any of the points shown in those exhibits?

A. Not every point—

Q. Well—

A. —in our rate books.

Q. In other words, you have different rates applying on different sized cars between certain points; is that correct—they apply as between certain other points?

A. Oh, yes, a difference in rates.

Q. Now, with such a situation prevailing, could you determine the accurate rates applying from Commission's Exhibit 1110-U—that is, from the information appearing in Commission's Exhibit 1110-U?

A. I certainly could not compute the freight charges from Commission's Exhibit 1110-U, because I didn't make it and had nothing to do with it.

33555 By Mr. MacIntyre:

Q. Well, now, showing you Commission's Exhibit 1110-L, you do know, as a matter of fact, that freight rates per hundred pounds vary between certain points in Michigan on various sized cars, do you not, Mr. Meyers (showing document to witness)?

A. Yes.

Q. Now, can you, therefore, look at Commission's Exhibit 1110-L, and tell us whether or not from it, and the information appearing in it, you can determine accurately the freight charges on a shipment of a car of 80,000 pounds between and and all points shown in that book?

A. I don't know any more about this one than I did about the other one.

Q. Well, can you, from the information appearing therein, determine actual freight charges on such sized car?

A. No.

Q. Thank you.

Well, why can't you, in those instances, Mr. Meyers?

A. I don't know what those rates are.

Q. You cannot determine from Commission's Exhibit 1110-L, can you?

A. No.

Q. Where do you look to to get your rates, freight rates, that you have for people in your organization to
33556 quote in bills of lading for your shipments?

A. When a shipment is made—

Mr. Smith: May I have that question read?

Trial Examiner Norwood: Read it.

(Last question read.)

A. We don't put the rate in our bills of lading, unless there is some particular instance where there might be a question of the railroad's interpretation of its own tariff.

By Mr. MacIntyre:

Q. Where do you get it in such instances?

A. From the railroad tariffs.

Q. Where do you get the freight rates that you have placed on your invoices?

A. Sometimes I get them from our rate book, and sometimes I have to go to the tariff.

Q. How often do you have to go to the tariff for them? In what percentage of cases?

A. I usually route our shipments over the most direct route. The rates are predicated on short-line mileage, and in that case I know from our own rate book whether or not it is going to be the proper rate or not.

Q. When you spoke of rate books, what book were you referring to?

A. We have a sample there in Respondents' Exhibit 2380.

33557 Q. Yes, Respondents' Exhibit 2380 and Commission's Exhibit 3246-A to H.

A. Yes.

Q. I thought I understood you to say a few moments ago that you could not determine rates on large cars, more than the minimum cars, where the different rates applied for larger than the minimum cars.

A. I believe I said that in connection with The Cement Institute books, and not our own.

Q. Well, can you determine that from your own books, where you have different rates applying for larger cars than for minimum cars between two points—can you determine from that book of yours, Respondents' Exhibit 2380, and Commission's Exhibit 3246-A to H (showing documents to witness), what the rate would be, the actual freight?

33558 A. No.

By Mr. MacIntyre:

Q. Well, in such cases when you cannot determine it, where do you get the freight rate that you do use on your invoices?

A. Well, the freight rate is the same for 50,000 as it is for 80,000 pounds.

Q. Well, where do you get the rate?

A. Well, either from our own rate book or from the railroad tariff.

Q. You just told us, though, that you cannot determine the rate from your book. Now, if you cannot determine it from your book, from what source do you determine it?

A. I don't believe that I said—if I said that I cannot determine the freight rate from our own book, why, I would—

Q. I am talking about—

Trial Examiner Norwood: Let the witness finish.

A. —well, I misspoke myself.

By Mr. MacIntyre:

Q. I am talking about the freight charges. Can you determine those from that book?

A. No.

33559 Q. Well, from what source do you determine such freight charges that you make on your invoice to your customer?

A. I give that rate to the accounting department, and they do it on a little machine that they have got.

Mr. Smith: Can I ask you, where do you get freight rates from, anyway.

The Witness: From the railroad tariffs.

Mr. Smith: Well, now, if you had said that 20 minutes ago we would have saved 20 minutes.

By Mr. MacIntyre:

Q. Now, from what source do you determine the route over which you make shipments, Mr. Meyers?

A. Geographical experience and from the tariffs.

Q. The official railroad tariffs?

A. Right.

Q. Any other records that you have, or know the existence of, to which you can turn to and get them?

A. No, no other source.

Q. Do you find it necessary to specify a routing?

A. Well, we have always done it on most of our shipments.

Q. You find it at least desirable, then, I presume?

A. Oh, of course.

Q. Why?

A. Service is one factor.

Q. Rates another?

33560 A. Rates enter into it.

Q. (Showing document to witness.) I now show you Respondents' Exhibit 2385, and ask you to tell us, after examining that, how many freight agents in the town of the—what is the name of the town there (indicating)?

A. Canandaigua.

Q. Yes. How many freight agents in that town would a dealer have to make application to for freight rates to determine what the freight charges would be on shipments of cement to him from Buffalo or from Oswego?

A. There are two railroad agents in Canandaigua from whom he could get part of the information.

Q. They would be able, since they are the only delivery agents to him, they would be able to give him all the information he would need, wouldn't they?

A. No, sir.

Q. From whom would he have to get the additional information?

A. He would have to go to the nearest office of the Lehigh Valley Railroad, which probably is—that is the nearest office where there is the tariff on file, which is probably Buffalo or Rochester.

Q. Well—

A. In order to get the benefit of the lowest rate for Pennsylvania delivery in Canandaigua.

Q. Now, let me ask you this question: There are

33561 only two freight agents there, one of them represents the Pennsylvania Railroad and the other represents the New York Central; isn't that correct?

A. Yes.

Q. Well, is it not a fact, Mr. Meyers, then, that if he went to those two agents that they would be able to give him the rates that they would charge him for cement that they delivered to him from either—that is, shipped from either Buffalo or Oswego?

A. He would be taking a chance on getting the lowest rate group.

Q. But they would give him the charges that they would make to him for the cement that they delivered to him shipped from those two points, wouldn't they?

A. Not necessarily the lowest rate.

Q. He could require them to give the rates to him in writing, couldn't he?

A. Yes.

Q. And he could determine from the information that he secured which was the favorable rate?

A. No, they would just quote him a freight rate, and it would probably be quoted over the entire route of the delivering road haul carrier.

Q. But, at least, he would have the freight charges that they would make to him for the shipment, that they
33562 would deliver to him shipped from either Buffalo or Oswego?

A. Yes, he would have a rate; he could compute the freight charges.

Q. Of course, if he asked him to give him rates by either one of the four or five routes involved, he would give him rates varying as the rates vary as shown on Respondents' Exhibit 2385, wouldn't he?

A. If he was intelligent enough to think of it.

Q. You do not think that business men are intelligent enough to know that more than one railroad route runs between this town and Buffalo?

A. I don't know how intelligent the people in Canandaigua, or any other city, are as far as traffic is concerned. I know that I have my troubles.

Q. You have found that purchasing agents for these building material dealers usually know something about the railroad lines between the points of the shipment of goods to them and their own locations, do you not?

A. I think in my entire history with the Huron Portland Cement Company I have seen three routing orders.

Q. Probably a lack of desire from expressing it in the other cases, do you think?

A. I couldn't say why.

Trial Examiner Norwood: You would be likely to
33563 receive those where the delivered price is the custom?

The Witness: You mean a routing order, Your Honor?

Trial Examiner Norwood: Yes.

The Witness: No; the routing orders are the results of solicitation by the carriers.

Trial Examiner Norwood: Yes.

The Witness: And they usually present them by a solicitor.

Trial Examiner Norwood: But they would not have the privilege of selecting the route on a delivered price order; would they?

The Witness: Well, if I got a routing order from a customer, I would go along with him on it, providing it was a good route over which there was a good rate. We had one example where the customer sent in a routing order, and we shipped one car that way, and after that car got there he changed back to the route that we were using previously.

By Mr. MacIntyre:

Q. Mr. Meyers, on direct examination you stated that you could figure and compute very closely land-grant rates to the levels that are used in settlements between railroads and the United States Government. Do you recall that?

A. I said, as I recall it, I could compute them close enough to suit our purposes.

33564 Q. For the purpose of quotation.

A. Yes.

Q. How close is that?

A. Sometimes it is pretty close and sometimes it is wide.

Q. It is, at best, then, an estimate; is that correct?

A. Yes—well, no, it is not exactly an estimate. I do a lot of figuring in order to come as closely as I can, and occasionally I get land-grant rates from the railroads. We do not come in contact with land grants a great deal.

Q. It was through the figuring of land-grant rates that you derived a price that your company quoted to the Government on the Fort Peck project back in 1934; was it not?

A. No; that was a plant price.

Q. Well, you figure land-grant rates from basing points, applicable basing points, to Fort Peck, Mont., and then made deductions of land-grants from Fort Peck, Mont., back to Duluth or Steelton base; did you not?

A. I did not figure it.

Q. Who did?

A. Probably Mr. Rooney.

Q. What is your basis for telling us that it was an f. o. b. plant price, then, if you did not figure it?

A. I saw the contract.

Q. Yes; but you do not know whether it was a derived price in the manner that I have stated, or not, though, do you?

33565 A. The Great Northern has not any land-grant rate from Duluth to Montana.

Q. Land-grant rates were used in that case, were they not?

A. I don't know whether they were used when we sold the Government at Fort Peck.

Q. Well, the exhibits in the record show that land-grant rates were used, and what I am asking you now is the question as to whether or not you knew that it was a derived price.

Mr. MacIntyre: I used "land-grant" in the same connection that Mr. Smith used the word "special" there.

Trial Examiner Norwood: Would that change your answer, Mr. Meyers? Would it make any difference for the purpose of the question whether it was land grant or
33566 special?

The Witness: Well, all I can say is that all I know about the Fort Peck contract is that it is a plant price. How it was computed I can't say.

By Mr. MacIntyre:

Q. You just have no knowledge as to how it was arrived at?

A. No.

Q. And your answer is the same as to how the prices were arrived at on this Fort Brady project, the Lighthouse Service projects, the W. P. A. projects at Cleveland, and so forth, that Mr. Smith asked you about; is that correct?

A. As far as I am concerned they are just figures—plant prices.

Q. You do not know how they were arrived at; they were just handed to you?

A. Well, I may have figured on some of them.

Q. Well, you did figure, but where the land grant was involved you first figured the land-grant rate from some applicable basing point to the project involved, as well as from your plant, did you not, and made those deductions before arriving at a so-called plant price?

A. Yes; and then probably—well, we monkeyed around with land grant figures, and we just made a price.

Q. When you say you "monkeyed" around, will you please explain that?

33567 A. Well, I did a lot of calculating back and forth.

Q. From basing points to the project, and from your mill to the project, and so forth; is that correct?

A. No, not necessarily.

Q. Well, tell us what the facts are.

A. I computed or attempted to compute land-grant rates from our competitor's mill.

Q. Which were basing points in most instances?

A. Do you mean price basing points?

Q. Yes.

A. Well, that would naturally be done. However, there were other points besides such points that we figured or attempted to figure the land-grant rates on.

Q. Now, Mr. Smith, on direct examination, asked you several questions about a shipment of 160 barrels of cement to the W. P. A. in Detroit, which you, on June 28, 1939, delivered to the W. P. A., in care of the Michigan Central Railroad in Detroit. You delivered it there at $1.66 per barrel, and you say you later found it was shipped to Alpena, where you had a price of $1.79. Do you recall that testimony?

A. Yes.

Q. This price of $1.79 at Alpena, was that a strip base price referred to?

A. The price packed in paper bags.

Q. At the plant.

33568 A. At Alpena?

Q. At your mill.

A. No; delivered in Alpena.

Q. Does it include freight switching charge?

A. Includes a switching charge.

Q. How far from the plant was that delivery?

A. Within the Alpena switching district.

Q. Do you know whether or not the cement was used within that switching limit by the W. P. A.?

A. A car went there.

Q. Do you know where it was used?

A. Well, our people at Alpena wanted to know where the Huron cement was coming from. They were not shipping it out of that plant.

Q. You do not know where it was actually used, though, do you?

A. I don't know the name of the street; no.

Q. Now, Mr. Smith read for the record this morning the invitation No. 13046, which you received from the Procurement Division of the Treasury Department, State Procurement Officer R. W. Clark, Lansing, Mich. That was on that invitation; is that correct?

A. I don't remember whether we received that invitation or not.

Q. Well, I am now showing you, Mr. Meyers, a telegram that Mr. Smith read into the record this morning,
33569 giving the invitation numbers, the contract numbers, and purchase order numbers on a project or contract in certain bidding that you undertook in 1938, or your company undertook. Did the contract that you entered into as covered by that number also cover this 160-barrel shipment that we have just been discussing?

A. Well, this is the information that I received from our office.

Q. From the Huron office in Detroit?

A. From the Huron office in Detroit.

Q. And what did you ask them for when you asked them to send you this information?

A. We asked them for the invitation number, the date the bids were taken, the contract number, the purchase order number, and the Procurement officer's name on the 375,000-barrel W. P. A. order at Detroit. That is the information we requested after the session last night.

Q. I mean that the contract that you just referred to resulted in this shipment of 160 barrels that we have been talking about; is not that correct?

A. The cement was shipped on this 375,000-barrel order.

Q. So that the record will be well connected, will you read to us the invitation number, the contract number, and the purchase order?

33570 A. June 24, 1938—

By Mr. MacIntyre:

Q. That is the date of the invitation.

A. (Continuing.) —invitation 13046, contract ERTPS-51-7771, PO-51—●

Q. That is the purchase order.

A. That is the purchase order, 51-35366, R. W. Clark.

Q. R. W. Clark was the purchasing officer of the United States Government; is that correct?

A. Yes, at Lansing.

Q. That contract under that number was for 375,000 barrels; is not that correct?

A. We had a contract for whatever that was.

33571 Q. And the deliveries ran through a period of more than a year under that contract?

A. Yes.

Q. And all those deliveries were made in Detroit, Mich., to the W. P. A. there?

A. Yes; and we shipped out of our Detroit plant and our Wyandotte plant.

Q. And, of course, the W. P. A. used that cement at various places over the State of Michigan after buying it under that contract; is not that correct?

A. Yes; they did.

Q. And wherever they found it to their advantage to do so, they secured the benefit of land-grant rates in shipping it over rails out of Detroit to the various Michigan points; is that correct?

A. Yes; they shipped it on Government bills of lading.

Q. Now, can you say whether or not the disadvantage that you stated yesterday fell to the Government on this shipment of 160 barrels out of that 375,000 barrels, was more than overcome by the advantages that it got on the 374,860 barrels?

Mr. Smith: Well, that does not fairly state the record. We object to it. We offered the Alpena shipment of a single car as typical of the shipments to a large number of towns, where this cement went, mentioning Grand Rapids, Muskegon, Holland, and Charlevoix—I re-
23572 member those specifically, and I think Iron Mountain.

Trial Examiner Norwood: Can he not bring out on cross-examination, if he is able to, that they are not typical?

Mr. Smith: Well, he is not trying to do that. He is trying to compare the saving on the 160 barrels against the 374,000, when the record indicates—

Trial Examiner Norwood: It tends to defeat the inference that would be based on the evidence that you put in.

Mr. Smith: No, Your Honor.

Trial Examiner Norwood: And it is cross-examination.

Mr. Smith: It is based on an incorrect statement on the record.

Trial Examiner Norwood: Well, I don't know—

Mr. Smith: All the shipments moving from Detroit were delivered at cost and exceeded what they could get it at in the town where it was placed.

Trial Examiner Norwood: Let us see if it is. That is what he is trying to find out.

33573 Trial Examiner Norwood: You may ask the witness if he knows if it is a fact or not. He has given us some testimony here, and Mr. MacIntyre has a right to test his knowledge as to the whole matter.

The objection is overruled.

A. Via the route that shipment moved—

A. I don't know anything about the subtracting that he has been doing in there. I am afraid I don't understand, Your Honor.

Mr. MacIntyre: I will try to put it in a different way.

Trial Examiner Norwood: If you have not sufficient information to say, tell him so.

33574 Mr. MacIntyre: I will try to restate the question.

By Mr. MacIntyre:

Q. Yesterday, Mr. Meyers, you stated to us that, in your opinion, the Government had suffered certain disadvantages in making this shipment of 160 barrels from Detroit to Alpena, rather than buying those particular barrels from you at Alpena. Now, I am asking you whether or not you can tell us as a fact that the advantages that were secured by the Government through its purchase of the other 374,840 barrels under that contract more than offset the disadvantages that might have, in your opinion, flowed to it from its purchase in the manner that it purchased those 160 barrels?

A. There were a lot more shipments diverted on that. There were two cars to Alpena, in fact.

Q. I am asking you about the sum total of the advantages under the entire 375,000 barrels. Can you tell me whether or not you know as a fact that the advantages were outweighed by the disadvantages, or whether the disadvantages outweighed the advantages to the Government on the sum total?

Mr. Smith: I repeat my objection. There is nothing in the record to show any advantages.

Trial Examiner Norwood: Objection overruled.

A. Based on my experince as a traffic manager—

By Mr. MacIntyre:

Q. I am asking you for your knowledge.

33575 Trial Examiner Norwood: Do you know whether or not the advantages you testified in regard to shipping that cement from Detroit to Alpena were compen-

sated for by other shipments that the Government got under this designated purchase here? Do you know whether or not? You can answer that "yes" or "no."

The Witness: No, sir; I would not know.

By Mr. MacIntyre:

Q. You have told us about the use by your company of a reconsignment or non-diversion stamp that your company places on shipping papers, bills of lading, in New York State. Do you remember your testimony on that?

A. Yes, we—I can say that we were using such a stamp in New York State.

Q. And I believe you told us that your office in Cleveland also has such a stamp?

A. I don't know whether he has still got it or not.

Q. Well, can you tell me when you started using the stamp in New York State?

A. During the Code period some time; I think it was just before the end of the Code period.

Q. About five years ago?

A. I would say probably around the first of May, 1935.

Q. Do you recall any conversations that you had, or communications you had, with Mr. George W. Cole, 33576 traffic manager of the Medusa Portland Cement Company, concerning the adoption and use of such a stamp by manufacturers of cement?

A. I don't recall such a conversation.

Q. You don't recall any communications or conversations with traffic managers of any cement company concerning the adoption and use of such stamps?

A. I don't recall any, no.

Q. Do you recall your attendance at any group meeting of representatives of members of The Cement Institute at which discussions were had concerning the adoption and use of such a stamp?

A. I attended no such meeting.

Q. Have you ever attended any meeting of representatives—any meeting held by representatives of members of The Cement Institute?

A. No, I have not.

Q. Have you ever attended any meeting of traffic managers of cement manufacturers?

A. One.

Q. When?

A. Within the past, oh, year and a half. It was in con-

nection with the Michigan Public Service Commission, Docket 3095, when the Commission ordered the cement companies to get together as a sub-committee to the Commission's general committee. The chairman of that committee called a second meeting, and I did not attend the
33577 second one. I had enough in the first one.

Q. (Showing document to witness.) I am showing you Commission's Exhibit 1043-J. Don't you recall having received a communication of which that is a photostat from George W. Cole, general traffic manager of the Medusa Portland Cement Company?

A. I don't recognize it at all.

Q. Do you have any other man as traffic manager in your organization of the Huron Portland Cement Company by the name of Meyers?

A. No.

Q. You are the only Meyers in the organization; is that correct?

A. Yes—at that time.

Q. Mr. Cole states that he is sending this to a T. W. Meyers, traffic manager of the Huron Portland Cement Company, Detroit, Mich. Would that be any other than you,—assuming that his statement is truthful?

Mr. Smith: We are not assuming that.

A. I wouldn't know where he got the initials "T. W.," or any other initials.

Q. Don't you recall having had correspondence with Mr. G. W. Cole on this subject?

A. I don't know—you will have to read the letter; I don't know yet what the subject is.

33578 Q. A matter of securing information from various cement manufacturers with respect to the trucking of cement for use by the railroad during May, 1931.

Mr. Smith: I think, Your Honor—

A. No, no.

33580 Q. Do you mean to say that you never received a communication or were in conversation with Mr. G. W. Cole, traffic manager of the Medusa Portland Cement Company, concerning the matter of truck transport of cement?

33581 A. I don't remember it, if I did.

Q. Quite a number of things with respect to the change in trucking policy of the Huron Portland Cement Company occurred on May 25, 1931, did they not, according to your testimony here?

A. Yes.

Q. Well, isn't that the date of this letter by Mr. Cole, Commission's Exhibit 1043-J (showing the document to witness)?

A. That's the date that it shows there.

Q. In which he told Mr. O'Boyle, general manager of the Wabash Railway, that he was going to secure from other cement manufacturers certain information for him with respect to the trucking of cement?

A. They certainly never got any of that kind of information out of us.

Q. That is, you do not recall it?

A. We never let anybody have our figures on trucking.

Q. Are you speaking now for Mr. S. T. Crapo, the general manager of your company, or for yourself?

A. Of course I am speaking for myself, and the company—

Q. And you do not know—

A. —and as traffic manager of the company.

Q. You do not know whether Mr. S. T. Crapo gave Mr. O'Boyle, or Mr. G. W. Cole, or J. B. Johns, of the Medusa Portland Cement Company, anything in the way of
33582 information on trucking, do you?

A. No, I wouldn't know that.

Redirect Examination by Mr. Smith.

Q. Mr. Meyers, in the cross-examination you were asked about the prices on cement,—as I recall your description, it sold f.o.b. your plant, and distributed by truck in Duluth.

A. Yes.

Q. It was not entirely clear to me. I want to see if we can reduce that just to the figures.

What is the price in Duluth at the present time on cement delivered by truck?

A. It is $2.34 per barrel in cloth at the plant,
33583 with 10 cents per barrel trucking compensation allowed to the customer for the use—as trucking compensation.

Q. Do you have any trucks there?

A. No.

Q. So that all the trucking from the Duluth plant is done by the fellow that comes with the truck and gets it away?

A. Yes.
Q. I see.
Now, what is the price in cloth? Do you have a price in cloth at the plant in Duluth for rail delivery?
A. Oh, yes.
Q. What is that? Is that more or less than the $2.24?
A. It is more; I think it was $2.39 in cloth.
Q. I see. So, on that basis the $2.39 would be your plant price in cloth for rail delivery, and $2.34, with 10 cents for allowance for trucking for cloth—the price where the customer took it away in trucks.
A. Yes. $2.39 delivered in carloads at Duluth, and $2.24 at the plant after taking out the trucking compensation.
Q. For the trucks?
A. In cloth.
Q. Now, in connection with these shipments to Alpena, as to which reference was made, did some of the cement on that order move to other points in Michigan?
A. Yes, sir.
33584 Q. Now, just how would you come to know that?
A. On all the truck shipments they had to give us the destination, because it was billed through to destination, and on all of the car shipments they had to give us the destinations so that they could match up their bills of lading with the proper shipments.
Q. Yes.
A. In other words, we knew all the time where it was going.
Q. I see.
33586 Q. What other points in Michigan do you know shipments moved on that order?
A. Holland.
Q. Where is Holland?
A. Oh, about 40 miles from our Muskegon plant.
Q. What other place?
A. Truck shipments to Douglas, which is 50 miles from Muskegon.
Q. Any to Muskegon?
A. Twenty-three cars that I recall went to Muskegon.
Q. Any to Grand Rapids?
A. Yes.
Q. Anywhere else?
A. Yes, many points.
Q. Well, name some of them.

A. St. Ignace; Iron Mountain.
Q. Where is St. Ignace?
A. The Upper Peninsula.
Q. Where is Iron Mountain?
A. That is in the Upper Peninsula.
33588 Q. Mr. Meyers, you figured out how many barrels we moved out of Detroit in this same way, especially, in which the Alpena situation is an illustration—
Mr. Smith: I offer to show that this witness made a computation for the time that the actual barrels went by him until it got to 100,000 barrels, or within a few barrels of that, and then he could not make the computation
33589 because he did not know how many more went. He did make the computation up to at least 99,500 barrels. We did not keep any record beyond that, on the balance of the 375,000.
33593 By Mr. Smith:
Q. Mr. Meyers, I have one more question: How many dealers have you had in Cleveland in the last couple of years?
A. Two.
Q. Some reference was made on cross-examination as to the prices to anybody in Cleveland. Is this true, or is it not, that Cleveland sells just to those two people?
A. Yes.
33594 Q. And what did they do with respect to taking the cement; where did they take it?
Mr. Smith: I meant, from where do they get it.
Trial Examiner Norwood: Yes.
A. Get it at the plant.
By Mr. Smith:
Q. And in whose equipment?
A. Their equipment.

Recross Examination by Mr. MacIntyre.

Q. Mr. Smith has asked you about this Duluth price of $2.34, which you said applied to truck delivery, less 10, and $2.39 in cloth for rail delivery; do you recall that?
A. Yes.
Q. What accounts for that total of 15 cents difference per barrel in truck as against rail? How it is arrived at?
A. As far as I know, it is just a figure.
Q. Well, who figured it out?

A. Cutler Magner Company.

33595 Q. You did not have anything to do with the figuring of it?

A. No.

Q. Do you know what relation it bears to the delivered price made by Cutler Magner Company to their customers in Duluth and the two Superiors?

A. Do you mean that the Superior dealers would get?

Q. Yes; from Cutler Magner Company.

A. They would get a plant price of $2.20, in cloth.

Q. Delivered?

A. No; at the plant.

Q. Well, what accounts for the difference between the $2.20 and the $2.34?

A. There is 4 cents difference.

Q. What accounts for that difference?

A. I don't know.

Q. The $2.20 you spoke about is the delivered price, carload rail delivered price on cement in Duluth; is that correct?

A. No.

Q. Well, what is the carload delivered price in cloth in Duluth?

A. I believe I stated somewhere around $2.39 in cloth.

Q. $2.39?

A. Yes.

Q. And the customer of Cutler Magner comes to the plant and gets it in cloth at the customer's trucks at $2.34 less 10?

33596 A. $2.34, less 10, for Duluth trade.

Q. Which is 4 cents per barrel higher than the carload base price at Steelton; is not that correct?

A. I would have to look at the Steelton base.

Q. Well, I understood your testimony was to that effect this morning. Will you clear us up on that, if you are incorrect?

A. Steelton is $1.80.

Q. So it is 4 cents per barrel higher than the Steelton base price; is that correct?

A. Yes, that is correct.

Q. And even that does not apply for truck deliveries to dealers outside of Duluth and Superior, but, instead, a railroad car delivery price applies to such dealers; that is,

in their trucks, from your Duluth plant; is that correct?

33597 Q. Is that correct?

A. I don't recall that I said anything about any dealers outside of Duluth and Superior.

Q. Well, I think the record will show that your testimony was to that effect this morning. Do you want to change that?

A. I believe my testimony of this morning was up to the date of the complaint, and at that time I think I testified that there were—that they were getting the destination price at the plant with the rail rate allowed.

Q. I do not recall that, but your testimony on the record will show. You do not want to change your testimony that you gave this morning on that point, do you?

A. The— I would like to have that exhibit again, if I may. I believe there was an exhibit entered on that.

Mr. Smith: No, no exhibit.

Trial Examiner Norwood: Can't you tell us without that?

33598

The Witness: If I recall correctly, I stated that there were plant prices at Duluth.

Mr. Smith: Can I take the witness a moment, Mr. MacIntyre?

Mr. MacIntyre: Yes.

Examination on Voir Dire by Mr. Smith.

Q. What is the plant price to a Duluth dealer, today?

A. $2.34 less 10 in the cloth.

Q. What is the plant price, if any, to a dealer in Superior today?

A. $2.20 in cloth.

Q. Well, now, you said the other was $2.34 less 10. Put the Superior dealer on the same basis. Is it $2.30 less 10 or is it $2.20?

A. No, it is $2.20.

Q. $2.20?

A. In cloth at the plant.

Q. I see.

Now, what is the Steelton base price today?

A. $1.80.

Q. $1.80. That would be what in cloth?

A. $2.20.

Q. So that the Superior dealer is $2.20, taking it
33599 at the Duluth plant; is that right?

A. Yes.

Q. And he trucks it away; is that right?

A. Yes.

Q. And the Steelton base is $2.20?

A. Yes.

Q. And the Duluth dealer takes it at the plant and trucks it away and pays $2.24?

A. $2.24.

Q. Now, are there dealers outside of Duluth that come there and get it at the plant—outside of Duluth and Superior?

A. I don't know.

Q. All right.

Now, how far is Steelton from Duluth?

A. Eight miles, or—

Q. The Dealer in Duluth that got the Steelton base price of $2.20 in cloth, would he have to truck it to Duluth?

A. Yes, he would have to truck it the 8 miles.

Q. Truck it or put it on rail; is that it?

A. Yes.

Mr. Smith: I think that that gives us a picture out of which both sides can make whatever argument they may wish.

Recross Examination (Continued) by Mr. MacIntyre.

33600 Q. But to your knowledge the dealers from outside of Duluth have never taken delivery by truck at your plant, and you do not know whether it is available to them?

A. I don't know at the present time; I know it has been done in the past.

Q. Well, how recently? All I want to get is it exactly, if we can, on that. I think you told us this morning something about 1933, March 10. Would that help you recall anything?

A. That was not in connection with Duluth. That's the date that we started the delivered basis in the Lower Peninsula of Michigan.

Q. Well, we will just have to give that up, I guess, and look to the record for clarification of it.

Now, on this Cleveland dealer question that Mr. Smith asked you, you say you have two dealers, one is the Cleveland Builders Supply Company there; is that it?

A. Yes.

Q. And it takes delivery at the many points in Cleveland, does it not?

A. On cement, it takes delivery at our plant.

Q. Well, I know, but for warehouses it operates in several different locations in Cleveland?

A. Oh, yes, it has warehouses throughout Cleveland.

Q. And irrespective of which warehouse it is, to take its cement to the Metropolitan Cleveland district,

33601 it takes one price?

A. Yes, at the plant.

Q. Do you know whether or not that price is any different from the price that applies delivered at those warehouses?

A. The delivered price is much higher.

Q. How much higher?

A. At least 20 cents a barrel higher.

Q. Do you actually know that to be a fact, Mr. Meyers?

A. $2.19 less $1.99 is 20, and $1.99 is the highest plant price that we have had recently.

Q. $1.99 is your plant price?

A. Yes.

Q. Is that stripped?

A. In cloth.

Q. In cloth?

A. In cloth.

Q. That is $1.59 stripped?

A. Yes.

Q. And the base price in Cleveland is $1.65; is that it?

A. No.

Q. What is it?

A. $1.50.

Q. So you are really charging 9 cents more than the base price for truck delivery when they come to your plant in Cleveland and get it; isn't that correct?

33602 A. On the business that moves at $1.99 in cloth, yes.

Q. Well, do you know of any business that moves on any different price than that?

A. Yes, I know of some $1.65 in paper.
Q. That is the base price, isn't it?
A. That's the base price plus—
Q. Yes, but for Cleveland delivery?
A. Yes.

PAUL H. TOWNSEND, being called as a witness for the Respondents and, being first duly sworn, testified as follows:

Direct Examination by Mr. Smith.

33603 I am general manager of Huron and have been associated with the company since September, 1919. I was first employed in the accountant's office, keeping certain records in connection with the plants, and held this position for three or four months. Then I took over the operation of the packing plants outside of Alpena which I have always continued to handle. Along about 1922 or 1923 I managed the plants and the boats and from about 1926 to 1927 I was assistant to S. T. Crapo, secretary and treasurer. I have been general manager since May
33604 25, 1939.

Q. What was the productive capacity of the company's plant in 1919 when you came with it, approximately?
A. The mill was about a million and three-quarters barrels a year.
Q. How many distributing plants did they have at that time?
A. Three.
Q. And how many boats?
A. One.
Q. What was that?
A. The Samuel Mitchell.
Q. The productive capacity now is what?
A. Four million barrels annually.
Q. How many plants have you got outside of Alpena?

33606 By Mr. Smith:

Q. Mr. Townsend, can you tell us the investment of the company in its auxiliary plant?

Mr. Paulson: Same objection, Your Honor, to that; same line.

Mr. Smith: That was not gone into, and that is a material factor in our theory of this case.

Trial Examiner Norwood: The objection is sustained.

Mr. Smith: Well, I offer to prove, Your Honor, that the Huron Portland Cement Company with its present mill has an investment of about $2.31 per barrel capacity, which is at least 21 cents higher than the average in the industry, and that it also has an investment of 4½ million dollars in the auxiliary plants found necessary for the distri-
33607 bution of its cement, and for the storage of its ce-
33608 ment in the various ports of the Lake district from its mill to which it moves its cement by boat; that the investment was necessary in order that it would find a distribution of its product, and that investment has compelled it to practices and prices which have been competitive in the extreme in all of the points at which it es business.

Now, I regard that as important upon the theory to meet the claim that this company has agreed in any respect, as charged in the complaint. From the very logic of the situation of this company, and the development of its business at the Lakes, it was impossible for it, logically, to reach an agreement or make any agreement with competitors whose territory it invaded, and which territory it had to invade in order to distribute the cement that was made at Alpena.

33609 Trial Examiner Norwood: Yes, I think that the Respondent should confine its proof to their practices, and the reasons therefor, and their competitive situation; of course, you can give that, or anything that has not heretofore been covered by testimony from officers of this company.

Mr. Smith: Well, I except to Your Honor's ruling.

Trial Examiner Norwood: Yes.

Mr. Smith: But I think Your Honor will permit me to say that to exclude me from making my proof because some proof of that kind has been produced by the Government, is unduly—

If I had brought a witness here and was now duplicating that witness, then—

Trial Examiner Norwood: Yes.

Mr. Smith: —but when I am not duplicating the testimony of any witness of my own, it seems to me that I am being unduly—

Trial Examiner Norwood: (Interposing) Isn't it rather futile, and a waste of time, for you to go ahead and prove something that the Government has already proven, and that has been done throughout this case for week
33610 after week?

Mr. Smith: I agree to that, but this question does not fall in that category. This question of the investment in our auxiliary plants has never been asked, and no proof has been offered on it. I was stopped before I reached that point before.

Trial Examiner Norwood: I think that that is entirely immaterial and irrelevant. I sustain the objection to that.

Go ahead.

Anything about your set-up there, that bears on the competitive situation, a question of price competition and methods of pricing, you may go right ahead on that.

Mr. Smith: Well, Your Honor, permit me to preserve my exception.

Trial Examiner Norwood: Yes.

Mr. Smith: I have, for example, before putting in my answer, made a picture as to this plant for this record, because the facts that surround its location, the boats, the location of its auxiliary plants, are all necessarily a part of the picture so that any one could determine what the picture of this company was in this industry.

Trial Examiner Norwood: If Counsel would submit, as requested, a written offer of proof on this witness here, probably we could eliminate some things and save a
33611 great deal of time, and terminate others.

Now, on that point I want to make a statement.

Counsel appearing for the particular Respondents should be informed at this time fully as to the state of the record, and should be aware that certain Respondents have gone into great detail in describing their business practices; their reasons therefor, and the conditions upon which these are based, and that a great deal of this is general and applies to all Respondents.

Now, it is the right of all other Respondents not yet fully heard from on these points to produce evidence showing that their particular practices, reasons, and conditions are the same as or different from those heretofore shown by the Lone Star Company, the Lehigh Company, Universal-Atlas Company, and other companies, heretofore, who have heretofore produced abundant evidence on these mat-

iers, and they have been doing so since September—the first of last September.

But where their practices are the same, as heretofore described in great detail, and with respect to such practices, reasons, and conditions, Respondents whose special evidence has yet to be offered, have a short way of taking full advantage of these details of evidence. They may even take advantage of such denials and disclosures of co-
operation, collusion, and agreement as the other
33612 Respondents have produced in evidence. They may do this by abbreviated examinations, and by reference to and general confirmation of evidence heretofore received, and they may take advantage of the stipulation contained in the first paragraph beginning on page 342 of the record, which gives any Respondent "the right at any stage of this proceeding to adopt any testimony offered by any other Respondent or Respondents without the necessity of any formal offers."

A proper use of these advantages and the admissions and offers to stipulate made by the Government's Counsel, and of the methods here suggested, would effect great economies of time and expense and bring about an early termination of this investigation.

The state of the record is such as to demand this result in the interest of the public and of this industry, and I feel fully justified in requiring methods and procedure which tend to produce these desired results.

Where methods, reasons, and conditions are different from those heretofore described, they should be shown. Particular explanations of matters in which particular Respondents are involved, as shown by the evidence heretofore received, may be the subject of future proffers; but a high degree of selectivity should be employed.

To this end Respondents have been notified to sub-
33613 mit written offers of proof prior to the introduction of a witness. Where this requirement would cause delay or prejudice a party in any way, it will, of course, not be insisted on; but it is now the duty of all Counsel connected with this case to employ shorter methods in the presentation of any further evidence they deem it advisable to adduce.

The time so far given is, in my opinion, sufficient to satisfy the rights of Respondents to offer evidence in their behalf and any considerable extension of this time would,

in the opinion of this Examiner, be an abuse of their rights and privileges, and I think that any further evidence on a great many points involved in this case would be wastefully cumulative.

So I am requesting the Counsel to furnish me a written proffer of proof to the introduction of any witness. They may either do that or they may state to me that they refuse to do that.

Mr. Smith: I have one further witness. Would Your Honor relax that rule as far as he is concerned?

Trial Examiner Norwood: I think so. We are hurrying up this week, and it will probably cause delay otherwise.

Mr. Smith: It will take me longer to prepare a stipulation or statement than it would to put him on.

33618 Washington, D. C.,
Friday, March 1, 1940.

33619 Mr. Smith: Will you mark this for identification, please.

Trial Examiner Norwood: It may be marked.

(A document was marked for identification "Respondents' Exhibit 2391.")

PAUL H. TOWNSEND thereupon resumed the stand and testified further as follows:

Direct Examination by Mr. Smith (Continued).

Q. Mr. Townsend, you said, I think, yesterday, that you had charge of the operations of the auxiliary plants.

A. Yes.

Q. Did you have, as a part of it, the supervision of the trucking from those plants?

33620 A. Yes.

Q. Did you cause, earlier during these hearings, to be prepared a statement, which was introduced in evidence at the request of the Commission, a comparison of the car and truck deliveries from the various plants?

A. Yes.

Q. Do you recall how far, in point of time, that statement was introduced, or carried your picture?

A. My recollection, that went up to some time—either the first or last of October, 1938.

Q. Yes. Were you asked to complete that picture with the complete 1938 and 1939?

A. Yes.

Q. (Handing document to witness) I am showing you Respondents' Exhibit for identification, 2391, and ask you if those are the figures that you compiled for that purpose?

A. Yes, they are.

Q. What does that show?

A. That shows at each one of our shipping points for the years 1938 and 1939 the percent of the business done through that particular point on car and truck, and a summary at the bottom showing all points.

Q. Yes.

Mr. Smith: I offer Respondents' Exhibit 2391 in evidence. It completes information asked for by the

33621 Government.

Trial Examiner Norwood: Yes.

Mr. Smith (handing document to Mr. MacIntyre): I will give you a copy of it.

By Mr. Smith:

Q. Some point was made yesterday, Mr. Townsend, as to the effect of the removal of the five-cent charge in Cleveland I think at the beginning of 1935. Do you recall whether your deliveries from your Cleveland plant by trucks went up or down after that change?

Q. Is that so, Mr. Townsend?

A. Yes, that's—

33622 Q. Whether it is measured in barrels or not, would not make any difference whether the shipments went up or down? That would be in 1935 or 1936?

A. It went down; yes.

Q. There was some testimony yesterday—

Examination on Voir Dire by Mr. Paulson.

Q. Mr. Townsend, does this tabulation, Exhibit 2391, embrace all of the business done by the Huron Portland Cement Company?

A. Yes, every barrel.

Q. And where it shows the shipments by car of 25.8 percent for 1935, and by truck of 74.2 percent, that is—

A. Allow me to correct that.

Q. (Continuing) —that is the proportion of your business that went by rail and by truck, is it?

33623 A. Yes.

Q. Your total business?

A. May I correct one thing there?

Q. Yes.

A. You said does that represent all, and I said every barrel. That represents every barrel that went by car and by truck. There was in each of those years a small volume of business that went by barge. It was a few thousand barrels, which would add—

Q. That went directly by barge to the consumer?

A. To the consumer; yes.

Q. What percentage would that be?

A. Oh, it would be under one percent.

Q. Yes.

A. A small figure—by barge or other type of water carrier.

Q. You would agree, would you not, Mr. Townsend, that a change in the percentage does not necessarily mean a change in the total amount?

A. That is right.

Q. That is what Mr. Smith just asked you.

A. That is right.

Q. In other words, in the year 1939 you shipped 71.8 percent of your output, with the exception of that little bit that went by barge, by truck.

A. Yes; that is what the figure shows there.

33624 Q. Yes, that is what this figure shows.

A. I do not have it in mind: I know it is between 70 and 75 percent.

Q. Now, does that mean that you delivered that much directly to customer's location, or does this embrace some hauling part way, and some of it had to move partly by rail?

A. Oh, no. No, I would not know of a single case where there was a two type haul in there. In other words, I think if there were a case like that it would be in the car figure rather than in the truck. You see what I am getting at?

Q. Yes.

A. Because it would undoubtedly leave our plant by car, and I have no doubt but what every single barrel that went by car will be transferred to truck, and we have no

way of knowing that; it reached its final destination by truck. Probably 99 percent reached its final destination by truck.

Trial Examiner Norwood: It will be received and marked.

(RESP. EX. 2391 was offered and received in evidence.)

Direct Examination by Mr. Smith (Continued).

33625 Q. What is your average truck haul on this truck movement?

A. Just under 20 miles. I took that off for the year 1931, which seemed to be a representative year, it ran just under 20 miles.

Q. Now, in setting up these outside plants, did you, as that haul went on, make any analysis of the territory to see what it was, particularly as to the truck haul deliveries?

A. Yes.

Q. In what respect?

A. We considered it from population standpoint, in an effort to locate it in the heart, as nearly as possible, of the consuming centers.

Q. Based on a radius of what mileage, did you use?

A. Sixty miles.

Q. Sixty miles?

A. Yes.

Mr. Smith: Will you mark this as Respondents' Exhibit 2392, for identification.

(The document was marked for identification "Respondents' Exhibit 2392.")

By Mr. Smith:

Q. I show you Respondents' Exhibit 2392, for identification, and ask you what that is (handing the document to the witness)?

33626 A. That is a map showing, as has been described, circles or segments of circles, marked in red, indicating areas of population within 60 miles of the Huron plant, based on the population figures from the U. S. Census book of 1930.

Q. State whether or not that graphically illustrates the results of studies you made from time to time as to the available points of location of these plants?

A. Yes; this is one particular study that we made in 1938, in connection with the Green Bay territory.

Q. I see. But prior studies of the same kind were made on the other plants?

A. Yes.

Mr. Smith: We offer that. That rounds out our picture of truck distribution, I think (handing the document to Mr. Paulson).

Trial Examiner Norwood: Does that represent truck deliveries f.o.b. mills, in customers' trucks, in the area in which you delivered the customer's truck f.o.b. mill price; that is, for customers living within those areas?

The Witness: No, sir. From my standpoint, at the time I made that, it had no relation to the method of delivery. We would simply know that 95 percent of our stuff is confined—95 percent of the stuff which moves by truck is confined to a 60-mile limit, and I wanted to see the in-
33627 terlocking of those 60-mile areas around the Lakes, and see whether that covered the Lake front or not.

Examination on Voir Dire by Mr. Paulson.

Q. I understood you to say that you made such a chart in order to determine whether it would be feasible to put in a plant, or additional plants, that was more or less?

A. Yes.

Q. Now, I would like to know—

A. That is, from the standpoint of population.

Q. Yes. You take 60 miles, as I understand it, as a radius, 60, is that right?

A. Yes.

Q. Is that what you found to be practicable?

A. Yes, that is what we used there, and—

Q. Well, now, do you deliver by truck beyond a 60-mile radius, or do these—

A. Oh, yes.

Q. You do?

A. We deliver by truck beyond 60 miles' radius.

Q. How far? These circles show a 60-mile radius, do they not, (referring to exhibit).

A. Yes.

33628 Q. That is, they are drawn—

A. They show that.

Q. In other words, they do not represent the territory to which you deliver by truck?

A. No, there is no relation.

Q. No?

A. No relation, as I remarked—

Q. Yes.

A. —to the Examiner, 95 percent of our stuff goes within a 60-mile radius, and so that is the radius.

Q. That is, you take that—

A. That we used.

Q. You use that to calculate or estimate the advisability of putting in new plants?

A. (No response.)

Q. What proportion do you have to find in an area in order to decide that a distribution point is advisable?

A. There is none.

Q. There is none?

A. There is none. It is conceivable that you may have a territory with some 300,000 population with no cement plant adjacent to it; that might be a better territory than one with 3,000,000 and six or eight cement plants. That is, that is simply one of the elements.

Q. Yes.

33629 A. Which enters into the picture, and then comes the sales—from there on it is the sales managers' problem.

Mr. Smith: Will you mark this for identification.

The Reporter: Your Honor, this paper is marked for identification "Respondents' Exhibit 2393."

(The document was marked for identification "Respondents' Exhibit 2393.")

By Mr. Smith:

Q. Did you make a study, Mr. Townsend, of your truck distribution in 1936 to show how many pounds was moved?

A. How many barrels?

Q. How many barrels were moved in each zone of 10 miles from around the plants?

A. (Witness makes no response.)

Q. (Handing to witness document marked for identification "Respondents' Exhibit 2393") Is that it?

A. Yes.

Q. That would give the detail; in answer to the question that Mr. Paulson asked, would it not, as to how many miles you actually did haul any cement?

A. Yes, yes, that shows the relationship between

33630 the various zones.

Q. Yes.

Mr. Smith: I offer in evidence Respondents' Exhibit 2393 (handing paper to Mr. Paulson).

Mr. Paulson: With respect to Respondents' Exhibit 2393, this purports to show the distribution moved by truck in the year 1936?

Mr. Smith: Yes.

By Mr. Paulson:

Q. Do you know, offhand, Mr. Townsend, whether the ratios in 1937 and 1938 and 1939 would be the same?

A. No, no. It just seemed to me that 1936 was a typical year, and I might say that a thousand some—a million some barrels—does that show at the top?

Q. A million, seventy-eight thousand.

A. That is not every barrel; that is not every barrel moved by truck in 1936, either.

Q. Well, why—

A. That was—

Q. What basis—

A. That was—

Q. On what basis was this selection made? Why the year 1936, and why not all the barrels, for instance?

A. Because they were the barrels at which we could determine the destination definitely. That is, we knew 33631 exactly where—the truck was moving—and—

Q. What percentage of the truck shipments do you think are included in this tabulation?

A. About 75 percent.

By Mr. Smith:

Q. You say you thought that?

A. In other words, any shipment about which we were not certain I did not put down.

By Mr. Paulson:

Q. Yes. What I was anxious to find out—

A. I wanted to—

Q. Did you finish?

A. (No further response.)

Q. What I was anxious to determine was whether or not the trucking radius had been extended in the last three years due to the better roads, perhaps, or better trucking facilities.

A. No, I would say not.

Q. You think not?

A. It has remained about the same. I don't think there would be any—

Q. I notice that you have eighty to ninety miles, 41,000 barrels, as against 130,000 barrels for thirty to forty miles. I wonder whether those figures would remain constant if a similar tabulation were prepared?

A. No.

33632 Q. For instance, in 19—

A. No, that would not remain constant. You may find more in a zone 10 miles this way, or the other, due to the fact that we may have had a particular road construction job 10 miles or 20 miles, one way or the other.

By Mr. Smith:

Q. But you did think that was fairly typical?

By Mr. Paulson:

Q. You think this is—

A. I think that is typical, and I am convinced that a statement that a majority of our stuff goes within—that is, the average of our stuff—goes within the 20-mile, would be taken off as of any year. That particular statement that you have there was made in the latter part of—at the end of 1936. I mean, it was not—we haven't made any study since.

Q. But you did have a trace of these truckloads so that none of this is guess?

A. None of that is guess—that is all—that's why we took that particular quantity. I just was making an effort to determine about where our stuff was going.

Q. Yes, my point is that you had actual figures as to this 1,078,000?

A. Yes, actual.

Q. And none of this was—all of this is backed up by actual figures?

33633 A. Actual.

Q. And none of it is estimated?

A. None of it is estimated, no.

Trial Examiner Norwood: Are there two of those papers now?

Mr. Smith: This is Respondents' Exhibit 2393, and 2392 was offered.

Trial Examiner Norwood: Yes, 2392 and 2393 are received in evidence.

(RESP. EXS. 2392 and 2393 were offered and received in evidence.)

Direct Examination by Mr. Smith (Continued).

33637 Q. Mr. Townsend, there was some suggestion yesterday that the sales department of the Huron Company might have, at certain dates, announced a change in policy as to the trucking by Huron. Will you tell us whether or not you can identify, as of any certain date, a definite change one way or the other in your trucking practices?

A. As of a certain particular date?

Q. Yes.

A. No. From an operating standpoint, any change would not become manifest on any particular date. The trucking situation, as I recall it, has always been in a state of flux.

Q. Before you had trucks were you making deliv-
33638 eries by any other means—

A. Yes.

Q. —than by rail?

A. We loaded wagons for years.

Q. Then, after that—

A. We loaded both trucks and wagons.

Q. Then, during that period—

A. My memory may not be right, but I think it was about 1935 when dealers came to the plant and got it.

33639 Q. That was 1933, I think. Perhaps we can shorten this if you will just briefly state, if you can, the story from the operating standpoint.

A. I cannot give, Mr. Smith, the exact dates of just what we did, but I do know that in the '20's, at the time when I came with the company, they were loading practically anything that came to the plant. I recall men straddling dumping wagons, and dropping the sacks down in the wagon. I can recall a truck coming with three or four yards of gravel and getting enough cement to make up the load. In other words, the dealer's truck was coming in, and some of it we were shipping out on the request of the dealer.

Q. How did that effect your operation in your plant? Give us the details of that, briefly.

A. Well, there was a period along in from 1922, probably to 1927, when cement was in demand around Detroit, and dealers would send their trucks in there along the middile of the night. Men would sit on their truck, and there

would be a line of trucks three or four blocks long, so that occasionally one dealer, one customer, or one contractor, who had more equipment than the other fellow, would sort of hog the issue. There were many trucks in line, and so we resorted to a system of giving tickets, the same as you would do at a barber shop, by which we let three
33640 trucks of one particular customer get in; that is, to get in for loads. That would be the situation the first thing in the morning, and then there would be a hiatus or a gap along before noon, when we would all be sitting around waiting for trucks to come back, or the wagons to come back.

Q. Now, along in 1931, 1932, and 1933—I don't remember the date exactly, but perhaps you do—there was another factor that came into it.

Mr. Paulson: You have only taken him up to 1927, Mr. Smith.

A. Well, that situation—there would be occasional times when the demand would not be so heavy, but, as I say, that tendency to get their equipment down the first thing in the morning has always held with us; and I think it holds wherever trucking is done.

Along about 1931 or 1932 we had considerable labor unrest in Detroit; and truck drivers were one of the first to become organized; so that there was not any more of that going down and sitting several hours waiting for a load. We got the trucks in, maybe, a half hour after our normal opening time. There were times when the congestion was pretty bad, and resulted in a dropping off of the small truck; that is, the dealer who would normally pick up five, ten, fifteen or twenty barrels was forced to go to a heavier load. Ordinarily, then, he would call a contract car-
33641 rier, and since we had probably established—that is, made connections with one of the chief contract carriers, they got in the habit of calling our particular trucker, so that a large majority—I don't know about a large majority, but a considerable amount of our truck business came to us not from our own order department, or not direct to our plant, but through the trucker.

Q. Did that induce any change in your—

A. Well, we had no control over the trucker. It seemed to us logical to do our own dispatching. What we were trying to do was to level off the unusually heavy demand in the morning, because we could not get the trucks. The

sales department was jumping on the operating department all the time for failure to give service here and there, and it just could not be produced, with everybody coming down. What we were trying to bring out was the tendency on our own order department to say, "Well, would you not just as soon have it at 2 o'clock this afternoon, or can you wait until the morning?" or something like that; in other words, to dispatch the business.

Q. How many cement truckers are there in Detroit?

A. Since they have had to show a certificate of convenience and necessity, there are three main contract carriers. They are limited common carriers.

Q. What is the name of your contract carrier?

A. Bezant.

33642 Q. And who are the others?

A. That is the Michigan Transportation Company.

Q. Yes; and are the other two tied up with anybody?

A. There is another one by the name of Posnik and another named Alger.

Q. Who are they contracted with?

A. I don't know exactly. That is, they haul for the other cement producers around. It would be my impression that Alger would do the majority of the Peerless hauling, and Ford—I can't say about Ford.

Q. State whether there is or is not an opportunity, if you wanted to shop around among the fellows who are occupied?

A. We are free to call any of those three. Anyone is free to call—that is, any of the cement producers. They are qualified to haul as limited carriers, for any of those cement producers in the territory; so we can call on any one of them.

Q. Is this regulation as to the dispatching of the cement an important factor in the problem, or is it not?

A. Well, without that you can run your plant costs up many times, because if you do not have anything to load, if you are depending entirely upon trucks, and you have nothing to load, your crew sits around until the trucks get back; so our chief effort is to spread our daily load that way to keep the loading costs down.

Q. Do you think that you have now given us, from
33643 your standpoint, a pretty fair general picture of your operating truck problems?

A. Yes.

Q. Getting back to my original question, as to whether you can identify this change from the time when the trucker came with his equipment to get it, and when he began to use your equipment, or when you began to make deliveries by contract, your contract carrier, at the more or less delivered price—can you identify any period when any one of those practices was exclusive?

A. I could not personally, no. From an operating standpoint I could not identify any of them because I well recall in 1935 and 1936, and along in that period, helping the contractors to locate truckers; that is, contract truckers for heavy construction jobs.

Q. Now, just one question there: What is your truckload built up to now, in number of barrels?

A. Ninety barrels.

Q. And they weigh about how much?

A. Eighteen tons—roughly between 17 and 18 tons.

Q. Just a word now—

A. That is cement alone.

Q. I see. Just a word, now, as to the type of equipment you have to have to carry 18 tons on a truck.

33644 A. Well, it is very special equipment. It has four wheels, fore and aft, on the trailer; that is to say, it is an eight-wheel vehicle, and if it is a semi-trailer, it would be ten wheels.

Q. Well, but this delivery by truck, in your opinion, could it or could it not be handled by the ordinary variety of equipment, like Ford trucks or Chevrolet trucks, or—

A. Oh, no.

Q. Mr. Townsend, somewhere in the proceeding there was just a criticism of the Huron because it extended its plant construction around the Lakes during the period of the depression. Would you comment on that?

33645 A. Probably if we had not had a depression we would not have had to expand. We operate 365 days in the year at the mill, in order to furnish power to the quarry for the Michigan Alkali Company, and in order to consume the fines—the fine stone. So we were driven to—we had the vessels, and there is nothing—there isn't a poorer investment in the world than a cold steamship, so we were driven to seek other markets.

Mr. Smith: That is all from this witness.

Trial Examiner Norwood: Examine him.

Cross-Examination by Mr. Paulson.

Q. Why did you enter into trucking, or allow trucking, in the first instance, Mr. Townsend?

A. I don't know, Mr. Paulson. It was going on when I came with the company in 1919,—that is, on wagons.

Q. Why did you continue to permit trucking?

A. Because it was the cheapest method of transportation within certain limits, certain zones.

Q. Do you find that your customers want it?

A. I—

Q. Is there a public demand for it?

A. Well, I presume that if they did not want it they wouldn't take 75—I think that would be self-evident. I, personally, have never said to a customer, "Do you want trucking?" but apparently we find that they want it.

Q. Yes. What is the outside mileage that truck-
33646 ing is economical, as you have found it in your experience?

A. Well, it is around 40 miles, as a comparison of rates would show.

Q. (Indicating paper.) This shows?

A. No, I am speaking of comparison of rates yesterday, that we put in.

Q. Yes.

A. Around 40, a break there between truck and rail, comes around 40 miles.

Q. Well, that is the most economical up to that point, but you truck as far as 120 or 150, even?

A. Yes. Well—

Q. How do you account for this trucking up to 150 miles?

A. I think you will find in a case like that some particular customer asked for—for about 30 barrels of Huron cement, and 15 barrels of high test cement, and 10 barrels of white cement, and there would be only one plant, perhaps, in the territory where we would have it, and the sales department would issue orders to that particular plant to ship. That generally accounts for our long-distance hauling.

Q. Yes.

A. We don't have to ship that distance, normally, to reach our trade; but it is where we want—where we have to serve some particular customer with a particular brand that he wouldn't have at the closest plant.

33647 Q. Have the limits of trucking extended or contracted in the last 10 years?

A. Well, they have extended with the improvement in the carrier, and the improvement in the roads.

Q. And how has the ratio of rates between trucking and rail affected that picture—first, include in that answer, will you tell us, if you know, whether the rates for trucking and rail have shifted with regard to each other in the last 10 years?

A. Ten years?

Q. Yes.

A. Our rates—I can't answer for rail, I am not a traffic man; but I do know truck rates pretty well.

Q. But assuming that—

A. But our truck rates have held very constantly over the last 10 years. We have made—in my recollection—one increase to our trucker, which was a voluntary increase on our part, and was not, as I recall, an increase in his filed rates, an increase in his minimum—we made one increase which covered distances within 30 miles.

Q. And, then, otherwise—

A. That's the only increase that I can recall.

Q. Otherwise, you think you have paid the same in 1930 to deliver cement to a 60-mile—to a point 60 miles from your mill—as you are paying now in 40; is that correct?

33648 A. I would say—I believe that is approximately correct. There was a time that I spoke of where there were labor difficulties and truckers organized, and the wages went up a little, and our rates went up a little.

Q. Now, do you know the relation between the rail and truck rates? Have rail rates, to your knowledge, remained the same also, or do you know?

A. Well, aside from those ex partes that they were talking about yesterday, it is my impression that they have remained the same; but there have been 4 cents here or there, one way or another, that I haven't been concerned with.

Q. Well, what was the ratio between rail and trucking rates in the 60-mile area, if you can summarize it, then?

A. That is such a variable—that is—

Q. In other words, I am trying to get at the saving to the public on deliveries made within a 60-mile radius, per barrel?

A. The savings to the public?
Q. Yes.
A. Within a 60 mile—well, you would take that down by the basis of the average.
Q. Yes.
A. That is 30 miles; is that right?
Q. That would be it.
A. Yes, 30 miles—oh, I wish I could answer that. Our own truck rate—my recollection of 30 miles—is about 24 cents, although that would show— Now, what the
33649 rail is for that distance, I can't answer, I would say, probably a little more, the biggest saving on trucking comes on the shorter distances.
Q. Shorter than 30 miles?
A. Yes, inside the 20 miles.
Q. And that, of course, covers your biggest deliveries too—
A. Yes, that's right.
Q. What do you think the saving is at a 15-mile point, a 15-mile average?
A. It is questionable whether the truck haul is any more than 50 percent of the rail haul, unless you get switching. Of course, if you are talking about switching limits, you are getting a switching rate which is less than the truck haul.
Q. Less than truck?
A. Yes. I am talking about a rail haul now.
Q. Yes.
A. Understand, I am not a traffic expert now. I am giving you my impression.
Trial Examiner Norwood: Will you read that answer, please.
(Last answer read by Reporter.)
By Mr. Paulson:
Q. I am going to ask you another question along that line: Evidently you consider you are rendering a service to the public by engaging a contract trucker?
A. Yes.
33650 Q. Is that true?
A. Yes.
Q. And I am trying to get an idea—
A. If we didn't engage him, he would.
Q. Yes.
A. He would do that.

Q. I am trying to get an idea, for instance, in the City of Detroit, what the extent of that service in terms of dollars amounts to. I think can get at it this way:

At a downtown street in the City of Detroit, for instance, if somebody wanted 10,000 barrels of cement down there, and they had to have it shipped by rail, what would the cost be, and what would it be under the present plant whereby you deliver direct to the site by truck?

A. Well, it is—

Q. I understand that you charge— Well, let me hear your answer.

A. Yes. It is doubtful if that rail haul would get any closer to the street than our plant at the outset. So that it eventually has to reach the job by truck, doesn't it?

Q. Yes.

A. Ordinarily.

Q. Yes.

A. You get it to some siding, and from there on the truck picks it up.

33651 Q. Of course, as I understand it now, you are charging the same amount for delivering that cement now, knowing the ultimate destination cost—let us put it that way—to the customer, is a rail destination price.

A. I guess that's right.

Q. Well, then—well, what rail destination price? What rail charge is included, then? Is it the switching charge that is added, or do you know?

A. (No response.)

Q. It is a base plus some rail, isn't it?

A. Well, I don't know. I can't answer that question. It is a—

Q. Well, what?

A. It is a price based on, we will say, rail delivery, that's conceded.

Q. I see.

A. Unless it happens to be a flat price in the territory which we did have, that is another problem.

Q. What is the cost of trucking 10,000 barrels from your plant over to that downtown street?

A. That 10 miles?

Q. Yes, let us say it is 10 miles.

A. Well, it would be 16 cents.

Q. Per barrel?

A. Per barrel.

33652 Q. Is that what your rate is, 16 cents?

A. That's right.

Q. For 10 miles?

A. Yes.

Q. Well, you are the general manager, I believe you said. Why doesn't your company charge— By the way, what is your base there at Detroit?

A. I don't know.

Q. Well, suppose it is $1.60, why don't you charge $1.76 for hauling it down there at the street?

A. (No response.)

Q. Why inject the rail figure in there?

A. Because it gives a basis for making a price.

Q. Well, why? You have a basis for making a price if you add truck rate to your plant price. Why isn't that basis satisfactory?

A. You are taking a specific case now of a street in the City of Detroit, and I cannot answer the details of how that particular price is made up. That may be a flat price which may or may not have a relationship to rail.

Q. Do you think that—

A. I can't answer that question.

Q. Is Mr. Rooney the one in your concern—

A. That's right.

Q. —that would know—

33653 A. He would know that.

Q. He would know—he should know—why the price is made the way it is made, too, shouldn't he?

A. Yes.

Q. You do not concern yourself with that?

A. No.

Q. You are more of an efficient—

A. We take the position that if we save—that by handling the trucking ourselves we can get that cement to the public in the most economical manner. If there is a saving it goes to the public whether you say to a man, "You do the hauling and save your 10 cents," or whether we give him the 10 cents after—

Q. Of course that would—

A. —in a reduced price.

Q. That would all—

A. Our record prices would show whether we made a saving—whether we give the public the benefit of it.

Q. Well, that would all depend upon whether or not you pass on the savings that are inherent—

A. Yes.

Q. —in truck transportation?

A. That's true.

Q. To the customer?

A. That's true.

Q. Or whether or not you make a profit by charg-
33654 ing a rail delivered price and doing the trucking.

A. Well, I—

Q. Now—

A. A profit in industry has to come from some source. I cannot say whether our profit comes from trucking. Perhaps it does. I do know that part of our profit comes from trucking, because we move at least 10 percent of our stuff on our own trucks in which we charge ourselves the going truck rate.

Q. Well, your records show that you make some profit on deliveries you make by contract carrier, do they not?

A. Yes; as far as—when you say "profit," I say that we move that stuff to certain destinations cheaper by contract carrier than we would by rail, yes. That is a part of our profit, the profit of our business.

Q. Mr. Smith traced your experience with loading trucks rather carefully, and you left out one or two things in my mind that I wanted to ask you about, whether the situation, like today, with regard to loading trucks, changed the situation.

First, let me ask you: Do you deliver entirely to contract carriers now?

A. No, we never have.

Q. That is, do some individuals come up with their Ford and Chevrolet and Dodge trucks now?

A. Yes, we—

33655 Q. Let me ask you one further question: Do you deliver exclusively to dealers, contractors, and ready-mix concerns, or do you also let the farmers come in and the merchants, and others?

A. Oh, no, we—

Q. Just the accredited customers?

A. Or each plant—I will answer that in this way—

Q. All right.

A. Each plant is given a list which shows the accredited customers, because credit is something—

Q. Yes.

A. —today. The people that may come into that plant and get cement, or who may order cement for delivery.

Q. Well, now, in other words, somebody can just not come driving up to your plant and lay the money on the line and take the cement away?

A. Oh, no.

Q. You have a list of customers with whom you do business.

A. That's right.

Q. And you stick to that.

A. That's right.

Q. And make additions and subtractions—

A. That's right.

Q. —as the case warrants.

A. Yes.

33656 Q. Now, then, do you still have any congested conditions in the mornings at your plant that you described as having prevailed in the early days after—

A. Yes, we still get it—

Q. Are you gradually—

A. —to a certain extent, but not as bad as it was.

Q. You are gradually getting that ironed out?

A. Yes, yes.

Q. Have you adopted any—do you still use the card system?

A. Oh, no.

Q. No?

A. Because we do our own dispatching, largely.

Q. Oh, yes, you are now in command—

A. Yes.

Q. —of the contract carrier?

A. Yes.

Q. And can tell him which load to take, where to take it, and when to take it?

A. That's right.

Q. I see.

A. So that we—

Q. You require him to appear at the plant at intervals so as not to—

A. Well, ordinarily, they will have a bunch of trucks,

three or four trucks, at all times at the plant, and
33657 our plant clerk is as good a truck dispatcher as you wish to find.

Q. Yes.

A. Ordinarily, he knows if he sends this fellow at a given destination about when he will be back.

Q. Yes.

A. So that we—

Q. May I ask a question: In other words, you are able to keep your packing and sacking help busy at all hours during the day?

A. Providing we have enough business.

Q. Providing you have the orders?

A. Providing we have the orders; that's right.

Q. Now, do you have any other expense in loading those trucks? Now that you have the loading rather systematized, do you have any more expense in loading those trucks than you would have in sending your cement by rail?

A. No, if we can—as I say—get that—control the dispatch, because our plants are all, with the exception of Duluth, are all what we call truck plants.

Q. Yes.

A. That is to say, they are equipped—

Q. Well, what is the—

A. —primarily for trucks.

Q. But how do you load your rail, then?

A. Well, we have a machine or two at each plant for the rail.

33658 Q. The opposite doors on the warehouse?

A. Yes.

Q. Or something like that?

A. So that a—

Q. A truck drives up to one side of your warehouse, and the rail to another?

A. Yes, in essence, that is the theory.

Q. Yes.

A. That is the theory.

Q. So that the same crew can work on both sides of the warehouse at the same time?

A. Yes.

33659 Q. In other words, you did not have to build any bigger warehouse, did you? Well, did you or did you not have to build any bigger warehouse?

A. Well, I hate to say what you would have to do if you were not set up for that, and that holds true at Duluth. We are estopped and have been, at Duluth, from setting up economical truck loading. Fortunately, there is a very small amount.

Q. Well, what do you do at Duluth?

A. Well, in order to load the truck at Duluth, when it comes in, if there is a carload, we have to break through the car to get at the truck. That doesn't make expensive loading.

Q. How much would it cost you? You would have to put another door on your warehouse, or wherever it is.

A. There is only one street there. You can't get to it.

Q. Oh, it is a geographical proposition.

A. A geographical proposition.

Q. I see.

A. As a matter of fact, putting the other door in the warehouse would not be the answer, because you would have to get the cement from the machine onto the hand truck, anyway, to get through that door, and there is your expense.

Q. Yes.

33660 *Redirect Examination by Mr. Smith.*

Q. Can you make any clearer the answer you gave to Mr. Paulson in response to his question as to how you passed on any saving that you made, by cheaper truck delivery or otherwise?

A. Well, I think the prices started at Detroit and vicinity, and that would answer that. We have always had it. As far as I can recollect, we have always had a low, almost depressed, price in that particular area of trucking.

Q. Then, he used another word, and I heard you object to it, and that is the word "silo."

A. I do object to the word "silo" as applied to our packing plants. "Silo," according to Webster, is a tank or sump for the storing of green fodder, known as ensilage, and our packing plants are anything but silos, although we do at times have circular bins, but there isn't much more to them than circular bins.

Trial Examiner Norwood: Are not these constructed so as to prevent the deterioration of your product?

The Witness: Yes.

Trial Examiner Norwood: As much as possible.

33661 The Witness: They are water tight.

Trial Examiner Norwood: Is it not customary in the trade to call those silos at all? Have you ever heard of that?

The Witness: Yes, there is a custom in the trade to speak of a particular round bin as a silo.

Trial Examiner Norwood: Yes.

The Witness: And if a man is adding to his packing plant a round bin, they will say he is building an additional silo; but the silo is not the plant, by any manner of means, any more than the plant office is the plant.

By Mr. Smith:

Q. Somebody besides you originated the word "silo," Mr. Townsend?

A. Decidedly.

Trial Examiner Norwood: We have heard many references to it here.

Mr. Smith: Our theory is that that word was invented by our competitors.

The Witness: Yes, they have been even known as "fish" houses.

Mr. Smith: That is all for this witness.

Trial Examiner Norwood: Thank you, Mr. Townsend.

(Witness excused.)

33662 ALBERT J. ROONEY called as a witness for the Respondents, being first duly sworn, testified as follows:

Direct Examination by Mr. Smith.

I am vice president in charge of sales of the Huron Portland Cement Company, and have acted in that capacity since 1933. I went with Huron in June, 1916. From 1916 to 1933 I was working in the sales department.

Q. During that period of time you had at least two sales managers?

33663 A. Yes, sir.

Q. What are their names?

A. Mr. Boardman first, and then Mr. Jones.

Q. In your functioning as in charge of the sales—and your title carries that, does it, in charge of the sales?

A. Yes, sir.

Q. Did you report specifically to any other officer of the company?

A. Not in the nature of reports, particularly. I consulted with other officers of the company.

Q. What I am getting at is, how free a hand did you have in the handling of the sales of the company?

A. Well, I think I had a full and free hand in the establishing of sales methods and policies.

Q. As to prices and practices in making prices, did you or did you not have to report to and take instructions from anyone?

A. No, sir.

Q. And, specifically, as to Mr. Crapo, while he was an official of the company, as to whether or not he supervised your work.

A. Well, in this way, that after some action had been taken, Mr. Crapo took a great deal of interest in the activities, and came around quite frequently, and I discussed a great many things with him, and told him what I had already done.

33664 Q. The Huron Company was for a time a member of The Cement Institute, was it not?

A. Yes, sir.

Q. And you were for a time an official of The Cement Institute?

A I was a trustee for District No. 4 of the Cement Institute, which district is the State of Michigan.

Q. Over what period of time, if at all, did you report to The Cement Institute as to your sales or other information, and over what period of time, if at all, did you file prices?

A. We reported to the Institute from the time that we first became members until our resignation, as to the volume of our sales for purposes of assessment, and we filed our prices during the period of the Code, from the beginning of the authority of the Code Authority of the Institute until the Supreme Court's decision.

Q. My question was not quite accurate. You confined your prices to the Code Authority, and you reported your sales for purpose of computing your dues and assessments with the Institute?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

Q. And when did that filing of prices cease?

A. Immediately upon the decision of the Su-
33665 preme Court in the Schechter case.

Q. When did the report as to sales for the purpose of your dues compensation cease?

A. Well, when we resigned.

Q. When was that?

A. As I recall the date, January 24, 1939.

Q. There was some testimony in the case, Mr. Rooney, as to the meetings at which both you and Mr. Cree were present. Can you identify those meetings and describe them and state under what circumstances they took place, if at all?

A. During the period of the Code, acting as trustee for District No. 4, we were developing a Code for the cement industry, and I attended meetings in which the Code, the proposed Code, was discussed. It was part of my duty then, as trustee for District No. 4 to, report back to the members in the district. I, therefore, on occasions, when I thought it was necessary that they should be advised of the progress, would call a meeting of the members in that district and explain to them what progress we had made.

Q. Do I understand that those are the meetings—I was referring to the meetings at which Mr. Cree was present. Are those the meetings?

A. Mr. Cree was usually present because he was a member of my district.

Q. Now, I will ask you, Mr. Rooney, whether or
33666 not, at any of those meetings, you arrived at any agreements as to prices or practices amongst those who were present at those meetings?

A. I never arrived at any agreement.

Q. And I will ask you whether or not at any other meetings or discussions with either Cree, or any of your other competitors, you made any agreements of any kind with reference to your prices or your practices?

A. No, sir.

Q. You did have other meetings, then, or discussions—let us use the word "discussions"—with some of your competitors.

A. Oh, yes. Quite frequently we had discussions in which competitors were involved.

Q. What would be the nature of them?

A. Well, much on the order of a group of farmers discussing the conditions of the crops, we discussed the market, conditions in the market, and prospective tonnage that there might be available. That is the extent of my discussion.

Q. Directing your attention particularly to the question of trucking practices, did you ever—and I think I can state that the record shows that they were discussed at several of these meetings with Cree—

A. Yes, sir.

Q. Did you reach any agreement as to those practices?

A. With Mr. Cree?

Q. Yes.

33667 A. No, sir; I never reached any agreement with Mr. Cree.

Q. There is some evidence in the case, I think, by Miss Fowley, as to an alleged telephone conversation with the Aetna in reference to a change in prices. I will ask you whether or not that conversation took place.

A. I do not recall any telephone conversations.

Q. Mr. Rooney, did you have to do with the preparation of the quotation order blank that were from time to time used by the Huron Company?

A. Yes, sir.

Q. Drawing your attention to the time prior to the Code, where were those made up?

A. In our office.

Mr. MacIntyre: Off the record.

(There was a discussion off the record.)

Mr. Smith: We will waive that subject and I will return to that later. That is the question of the order blank.

By Mr. Smith:

Q. Mr. Rooney, going back to the time when the so-called Michigan plan was put into effect, that was about when?

A. In January, 1937.

Q. Can you tell us for how long a period of time prior to that that had been under discussion?

A. Well, I had been thinking of some such plan 33668 as applicable to Michigan for six months to ten months prior to the time it was put into effect.

Q. Had there been discussions going on about it?

A. Well, I can recall no discussion, excepting that in conversations with Mr. Crapo I had told him what my thoughts were in the matter, and he rather agreed with me, that it might be a feasible thing to do.

Q. Did any particular discussion precipitate that decision, just about the beginning of the year 1937?

A. Yes, sir.

Q. What was that?

A. Well, I would have to go back a little, probably. There had been apparently some difficulty between the Wabash and the Aetna Company with respect to some marketing activities, and as a result of that the Wabash Company had put a base on the Bay City plant of the Aetna Company, reducing the price in the area. That had remained in effect for quite a considerable time, and about the first of December—in or about—1936, the Aetna Company came out with quotations increasing this price back to its former level. That was what they thought would be desirable, apparently, but before these quotations had been in the hands of the dealers more than a day or two, the Wabash came out with quotations, bringing it back down to their idea of what the level should be.

Well, that caused quite a state of confusion. We 33669 did not know what the level was. It got to a point where it was rather indefinite. We did not know what the price was, and what kind of competition we had to meet; so I thought that would be a pretty good idea to wash the whole thing out, and I came out with a flat price for the Lower Peninsula of the State of Michigan, which I had determined in advance would level the whole thing off and wash out some of the difficulty.

Q. You say "wash out." What do you mean?

A. Wash out that difficulty between the Aetna Company and the Wabash Company.

Q. In other words, there would be a new price lower than what either one of them would be?

A. That is right.

Q. Is that what you mean when you say "wash out"?

A. Yes.

Q. And that Michigan plan—

Trial Examiner Norwood: Do you mean that reduces the prices all over the State to the level of that Bay City basis?

The Witness: No. The Bay City base, or any other base, as far as the Lower Peninsula of Michigan was concerned, became inoperative at that time. The flat price that was put out throughout the State was not determined from any base; Your Honor.

By Mr. Smith:

33670 Q. That remained in effect until when?

A. I think it was in April, 1938.

Q. What induced you to abandon it then and go back to the former system?

A. Well, I had had plenty of opportunity to analyze it during the period, and I had come to determine that it was not a sound economic method of marketing.

Q. Had it increased your tonnage any?

A. No.

Q. Some reference was made to the difficulty in that system over around Muskegon—

Mr. Smith: I think there is a pending question there, as to how the Muskegon situation affected that. Will you read that question, Mr. Reporter?

33671 (Question read as follows:

"Q. Some reference was made to the difficulty in that system over around Muskegon—").

By Mr. Smith:

Q. Will you elaborate on that?

A. I think, in analyzing it, Muskegon was a fair example of its being unsound. From a geographical standpoint, our truck deliveries from Muskegon, as well as car deliveries, would cover greater distances than they would from other plants. Therefore, as to the cost of our transportation to these distant points, our net at Muskegon realized was not as good as we would like it to be.

Q. Now, Mr. Rooney, did you or not bid on the Good Friday invitation of the Government?

A. We did.

Q. Did you bid on the invitation in 1937 for the W. P. A. Procurement at Cleveland?

A. We did.

Q. What did you bid there—plant price or delivered price?

A. In December 1937, our bid went in for Cleveland for delivery the first quarter of the next calendar year, and we bid that at a plant price.

Q. Were there further lettings and further deliveries there following that in 1938?

A. Oh, yes.

33672 Q. How about the second quarter?

A. Well, bids were taken for the second quarter and we bid, as well as other bids that went in, and they were not accepted by the Government for that second quarter.

Q. What was you bid there, plant or delivered?

A. That was plant.

Q. How about the third quarter?

A. Then they didn't take any more quarterly, or they didn't ask for any more quarterly bids.

Q. I see.

Now, at that same time—

Trial Examiner Norwood (Interposing): Now, do you mean by plant bid—do you mean an f. o. b. mill bid?

The Witness: Yes, Your Honor.

By Mr. Smith:

Q. At the same time were sales made either by you directly or through your dealers to the Government in Detroit on the same basis?

A. That was—yes, a little later in 1938.

Q. Yes. And at Flint?

A. Yes, sir.

Q. Can you give us, in round figures, an estimated figure on your deliveries on those bids and prices that you made then in 1938, approximately?

A. Do you mean including Cleveland?

33673 Q. Well, as well as Detroit—well, yes, Cleveland, and—

A. Approximately a million barrels.

Q. State whether or not there was any restriction as to those deliveries as to where the cement could be taken and used by the Government?

A. We made no restrictions. There wasn't at the time any necessity for that subject coming up, because they asked for bids for delivery at Detroit and at Flint, and those—

Q. And at Cleveland?

A. —in the Cleveland region were for Cuyahoga County.

Q. I see.

Well, Flint wouldn't be a location of one of your plants, would it?

A. I didn't understand that, Mr. Smith.

Q. You do not have a plant located at Flint?

A. No.

Q. So your Flint deliveries, were they or were not f. o. b. plant?

A. The Flint deliveries were at destination.

Q. I see, but you did have a plant at Detroit and Wyandotte.

A. Yes, sir.

Q. And one at Cleveland?

A. Yes, sir.

Q. Have you any interest at all in the question of imported cement?

33674 A. No, no direct interest.

Q. Is there any—at least in recent years have there been any in your territory?

A. No, sir.

Q. Do you recall whether or not when the five-cent differential was taken off in Cleveland on truck deliveries in January, 1935, your truck tonnage went up or down?

A. Well, our records show at that time that it dropped off.

Q. What demand, is there, Mr. Rooney, from the general trade for f. o. b. plant prices?

A. Very little from the public.

Q. From your experience, from the knowledge of the public's attitude, can you state any reasons that have been advanced to you in that respect?

33675 Trial Examiner Norwood: Now, you may base that on any knowledge of any business reports that came to you from your subordinates in the carrying out of your instructions in that respect?

The Witness: Yes, the dealers, as a rule—

The Witness (Continuing): —have expressed their—

33676 By Mr. Smith:

Q. Where would you derive your knowledge and opinion as to what the public wanted as to delivered

33677 prices or f. o. b. plant prices?

A. From reports of the salesmen in the field, and from my own contacts with dealers.

Q. And have you arrived at any conclusion or opinion

as to what the attitude of the general public is as to whether they want delivered prices or prices f. o. b. plant?

Q. Well, Mr. Rooney—Well, first, has your sales department any policy upon the question of whether Huron wants to give delivered prices or plant prices on your cement?

A. I would like to have that repeated.

Trial Examiner Norwpod: Read it.

(Last question read.)

A. No; we have not.

Q. Why not?

A. We are rather inclined to the idea in the operating of our business that we should satisfy the public in its demands. If we felt that the public were more in-
33678 terested in one type of service we would do our best to see that they got it.

Q. How does that relate, if at all, to your experience over the years of your operation?

A. It has been our practice, and we watch that very carefully, to see that we do satisfy our public.

Q. Well, there was some testimony as to an f. o. b. plant price in Cleveland. Can you verify that? How long has that been going on?

A. Well, I would say since the first direct bid that we made f. o. b. plant to the Procurement Division at Cleveland in December, 1937.

Q. 1936 or 7—yes, 1937.

And how many dealers have you got in Cleveland?

A. Two. That does not only consist of Cleveland; that is for Cuyahoga County.

Q. I see.

Then was there a period prior to that where generally—I will ask you whether or not, now, where generally at all of your plants you gave a plant price for truck delivery?

33679 Mr. Smith: Well—

Mr. MacIntyre: Now, an effort to confuse it again would be, of course a matter of further duplicating the record.

Mr. Smith: I did not think it was confused, and I was not trying to clear up confusion; but the witness has said that they never had a policy as to plant or delivered prices, that they knew what the public wanted. And I wanted to tie that in with their factual history, which was for the

time they made plant prices, and that they thought the public did not want them and they made delivered prices, and now at Cleveland they have a couple of dealers that want plant prices, and they get them, and if the people want plant prices they will make them to them. That is what I want to clear up. That is what I am trying to show by this question.

Trial Examiner Norwood: Read the question.

(Last question read by Reporter.)

Mr. Paulson: That is different.

Trial Examiner Norwood: I shall overrule the objection. If Counsel will explain what he means by plant price—you mean f. o. b. price?

Mr. Smith: Well, yes, f. o. b. I should adopt that—f. o. b. mill.

Trial Examiner Norwood: You may show that.

33680 A. We have permitted dealers to come to our plant continuously. We are doing it today, and have for a great length of time, for loading their equipment.

Q. Am I correct, then, in my statement that in the early days there was an f. o. b. mill price for truck deliveries, at least?

A: Well, yes, by virtue of the method of freight allowances—

Q. Yes.

A. —If figured back to the plants.

Q. That is right. That is it.

Have you ever—

Trial Examiner Norwood: You mean you sold them on the destination price less freight, and that is what you are referring to as a plant price?

The Witness: That is one method of plant price.

Trial Examiner Norwood: Well, what is the other?

The Witness: The orther would be where they would come to the plant and get the price without any freight allowance.

Trial Examiner Norwood: Mill base price; is that right?

The Witness: There have been such, yes, yes, we have had such.

By Mr. Smith:

Q. Have you ever done what has been referred
33681 to as establishing a base price on a competitor's mill?

A. We have not.

Q. Is there or has there ever been, as to your several plants around the Lake, any plant price established by you that was based on a competitor's mill plus freight to that point?

A. No, sir.

Mr. Smith: Now, I think I am about through, Your Honor. We had only the question of marking this exhibit which I tendered to Counsel. May I see that exhibit, please?

Mr. Paulson: I think you have it.

Mr. Smith: Here it is, yes.

By Mr. Smith:

Q. Did I ask you to prepare a file of all your quotations and order blanks, Mr. Rooney, for use in this case?

A. Yes, sir.

Q. Did you prepare such a file?

A. Yes, sir.

Q. (Referring to paper) I see it begins—the first one is in June, 1931, down to November 23, 1937. I see it is dated here. That would be—

A. I have forgotten the dates.

Q. Yes.

A. But I know that I supervised the preparation of it.

Q. And they are placed here in chronological order, are they?

23682 A. Yes.

Q. And attached to them is a statement which describes them and shows as to each succeeding one any changes from the prior one?

A. Yes, sir.

Q. And if you were asked in detail to review these various blanks and point out the modifications from time to time, and the dates on which they were put out, this statement that you have attached here would be your testimony (referring to document)?

A. Yes, that would cover the situation, I think.

Q. Yes.

Mr. Smith: I desire to offer that, Your. The question arose between Mr. MacIntyre and myself. He had some views as to how it should be marked. I am not particular as to how it is marked (handing document referred to the Trial Examiner).

Trial Examiner Norwood: I do not want to see it.

Mr. Smith: Oh.

Trial Examiner Norwood: Is it marked for identification?

Mr. Smith: Not yet.

Mr. MacIntyre: Off the record. Are you ready now for it to be marked?

Mr. Smith: Yes.

33683 Trial Examiner Norwood: Mark it Respondents' Exhibit 2394-A to Z-52.

(The document was marked for identification "Respondents' Exhibit 2394-A to 2394-Z-52.")

Mr. Smith: I offer the statement in evidence.

Trial Examiner Norwood: You offer this statement which is Respondents' Exhibit 2394-A to Z-52?

Mr. Smith: Yes.

By Mr. Smtih:

Q. That is the statement to which you refer in your answers to my questions just now; is it not, Mr. Rooney (referring to Respondents' Exhibit 2394-A to Z-52)?

A. Yes, sir.

Trial Examiner Norwood: Do you testify to the truth of those typewritten statements there?

The Witness: Yes, sir.

Trial Examiner Norwood: Any objection?

33686 (RESP. EX. 2394-A to 2394-Z-40 was offered and received in evidence.)

By Mr. Smith:

Q. There has been some mention of certain instances, where I think you and the other witnesses testified that Huron made the f. o. b. mill or plant price, but that that price was identical with what would have been the delivered price on that same sale. I want to ask you whether there are or are not any advantages that occur to that purchaser, who comes and gets it at the plant, and who pays a price equivalent to what would have been the price at a delivered point?

33687 Mr. Smith: I will modify the question.

By Mr. Smith:

Q. What advantages or disadvantages were there to the purchaser in such a case?

A. The dealer or customer who uses that method of getting his cement does it, in the first place, for convenience to himself in securing a quantity of cement which is smaller than the amount of cement that we will make

delivery to him, on his boat, which enables him also to have the advantage of our warehousing the cement for him until he is ready to use it—come and get it, and we provide, in handling a situation of that character, some effort on our part in loading his equipment for him, which is an advantage against his loading his own equip-
33688 ment out of his warehouse.

Cross-Examination by Mr. Wooden.

Q. Mr. Rooney, can you tell us when and where the Huron Company has made an f. o. b. mill or f. o. b. plant price to its customers without regard to where the customers wanted the cement delivered, and without regard to the destination price at such place of use?

A. The Good Friday proposal that we made to the Government had no restrictions of any character on it.

Q. All right. Any others?

A. We made no restrictions on the bids that we made to the Procurement Division for Flint, Detroit, and Cleveland. They were asked—when they asked for proposals, of course, we assumed that they were going to take it at the points designated, and that was our expectation, but we made no protest when they determined to divert it to other points.

Q. Have there been private purchasers who could obtain their cement f. o. b. your mill or plant without regard to where they wanted to use it, or without regard to the destination price at the place of use?

33689 A. Many times in our experience.

Q. Since when?

A. Well, back in 19—in the '20's, and in the early '30's.

Q. You discontinued that method in the early '30's?

A. We changed the method of distribution by taking over the handling of the dispatching ourselves in the early '30's; yes, sir.

Q. And from then on you charged purchasers on the basis of a destination price or a derived price as the destination price?

A. Not always.

Q. Generally speaking?

A. Generally speaking. It was a method that we carried out because we wanted to handle the distribution ourselves.

Q. Was there any change in your policy under the Code in that respect?

A. No, under the Code we continued to truck; we made delivered prices to destinations.

Q. In other words, you adopted your delivered-price policy before the Code?

A. That's right.

Q. And about when?

A. In early 1933.

Q. Do I understand that before early 1933 you sold purchasers f. o. b. mill, or f. o. b. plant, wtihout any regard to where they wanted to take the cement, or without
33690 regard to any destination price at the place they wanted to use it?

A. That's correct.

Q. Was it early in 1933 that you began holding meetings with competitors to discuss various selling policies?

A. Well, I don't know—I haven't—I haven't held any conferences with other competitors to discuss selling policies until we were called in to conferences for the development of the Code.

Q. Is the policy of the Huron Company, as adopted and stated in their circular of March 10, 1933,—has that continued to be the policy since then?

A. That is when we announced to the public that we were going to carry on the distribution. Is that what you mean, Mr. Wooden?

Q. Well, as I understand it, that is when you went on a delivered-price basis, about that time?

A. Yes.

Q. Do you have the date of the circular in mind that I am referring to, March 10, 1933?

A. Yes, I do.

Q. Is that the time that marked your adoption of the delivered-price policy?

A. That's the time that we announced it publicly that that would be our policy; yes, sir.

Q. And there has been no change in it since
33691 that time, as I understand it?

A. If there were any changes from that policy they were minor changes that might have affected other territory than that to which that particular announcement went to; but substantially the principle was the same.

Q. And as a general policy in the territory—in all of its territories?

A. That is correct. The only deviation that I know from that original policy that we had in Michigan was where we sent an announcement into other territories that we would deliver only to a dealer's warehouse.

Q. At the delivered price effective there?

A. That is right, sir.

Q. Now, you said that dealers do not want f. o. b. mill prices; is that correct?

A. They do not indicate to us in any way that they want them.

Q. What about the time when you were selling f. o. b. your mill prior to 1933? Did the dealers express themselves one way or the other on that policy?

A. Very definitely.

Q. To what effect?

A. Well, I will recall an instance where we were confronted with a difficult situation, wherein a dealer outside of the limits of Detroit would come to our plant, supposedly to get cement for his own trading area, and deliver it—and sell it on the way out or into the
33692 City of Detroit, very much to the discomfiture of the Detroit dealers, who then very definitely protested.

Q. Is that the case of the John R. Fuel Company?

A. That is one of them; yes, sir.

Q. Was that a typical sort of an experience?

A. Yes, that was quite typical.

Q. Is that the sort of experience that you referred to when you stated that some dealers did not want f. o. b. mill prices?

A. Yes, that is one reason why they did not like it, because they found too much interference in their trading areas by outsiders.

Q. Now, you had some dealers' associations take the matter up with you, too; did you not?

A. Well, yes. I would say yes, because it was not limited to that. We had dealers' associations take up the question of trucking with us, even after we put it on a delivered basis.

Q. Yes; but you had some of them take the matter up with you of selling f. o. b. mill or plant, too; did you not, prior to the time that you went on the delivered basis?

A. I don't recall.

Q. Did you not have the Michigan Retail Lumber Deal-

ers' Association make representations to you that they did not want this f. o. b. mill selling?

A. I do not recall their making any representa-
33693 tion, as an organization.

Q. But their officials did, did they not? Did not the secretary?

A. Not of the Lumber Dealers' Association.

Q. Some dealers' association—the Building Material Dealers' Association?

A. Yes, we might have had some from them.

Q. And was the reason for their objection because it resulted in such instances as this John R. Fuel Company matter?

A. I would not know what was in their minds; however, I would say that it would be perfectly logical to expect that they used that as a basis for their protest.

Q. I did not mean to ask you what was in their minds, except as it was expressed to you. What was their expression to you on that subject?

A. That was it.

Q. That was it?

A. That was it.

Q. Were there other dealers than the John R. Fuel Company, who were buying that way and taking the cement into other dealers' territory and upsetting the market?

A. Yes; there were quite a number of cases.

Q. Well, those dealers preferred the f. o. b. method of selling, did they not?

A. The few who were able to use that as a
33694 method of "chiseling" liked it.

Q. And by "chiseling," what do you mean?

A. I mean they would buy it for their own far-away destination and get a very substantial freight allowance, and then peddle it within an area that was not their own trading area.

Q. On a higher price level; in other words, they cut the price in that way?

A. That is right.

If you will permit me, I might add to that, that I recall instances where the truckers became conversant—some small trucking operations in the small towns became conversant with the situation, and they would get permits from the dealer to come in to pick up cement, and then the

trucker found that there was an opportunity there for him to go on his own, and he would come in representing himself as coming from the dealer, and do a little business of his own on the way back, by peddling cement here and there, which, of course, was another very disturbing situation.

Q. And he would, likewise, sell at less than the prevailing price in the territory where he "chiseled," so to speak?

A. I would not know. I am assuming that he might, but I would not know what he sold it at.

Q. Well, did not the dealers present that situation to you in that way?

A. Yes; it was for them to find out what they
33695 were selling at.

Q. Would you say that your aim has been to satisfy the public and give the public what they want, you made exceptions in your mind as to these "chiselers" that you referred to?

A. I was not talking of the dealers as being chiselers.

Q. John R. Fuel Company was not chiseling on the Detroit dealer?

A. I did not call him that.

Q. Well, you did.

A. I didn't, no.

Q. I mean just now.

A. No, I said—some small time truckers were doing some chiseling.

Q. Well, you used the word before I did, and I thought you used it in connection with the John R. Fuel chiseling on the Detroit dealers; isn't that right?

A. Well, I prefer to make the limitation—you could extend that to mean—interpret that to mean that I was including the whole world, if you would like.

Q. No, I did not think that.

Trial Examiner Norwood: Well, the John R. firm did chisel a bit, didn't they? The John R. Fuel Company?

The Witness: Oh, I would say so, yes. Let us limit it to that particular one, though.

By Mr. Wooden:

33696 Q. In other words, you treat your customers—so to speak, divide them into classes? I am not referring to the individual desires of particular customers or interest of particular customers. Isn't that right?

A. I don't think so.

Q. Well, then why didn't you continue to let these dealers take cement f.o.b. mill or plant, if they wanted it, and sell the others that wanted delivered, sell them delivered?

A. Well, in the case of the John R. Fuel & Supply Company, there were so many protests came from the Detroit area that we felt constrained to discontinue selling to the John R. Fuel & Supply Company. We preferred to do that rather than to lose a half dozen to a dozen dealers in Detroit. That's why we did it, as a matter of sales preservation.

Q. Well, weren't you first dealing with your dealer trade on the basis of a class rather than upon the individual wishes and interests of the particular customers?

A. I don't think so.

Q. Well, all right.

Now, these bids and sales that you made to the Procurement Division, beginning in December, 1937, and running into 1938, did you make the same price on those bids as you were making to private buyers at the same locations?

A. No, sir.

33697 Q. What were the prices made to private buyers as compared to those made on the Procurement Division bids?

A. Well, there was the difference of the freight rate to the destination involved. The Government bought it at the plant price; that is, the plant base price.

Q. Which was the same to all the buyers at that time?

A. No, all buyers at that time were buying at a delivered price.

Q. Based on the plant price?

A. Based on the plant price, sure.

Q. Now, you mentioned Cuyahoga County purchases of bids to the Procurement Division. Were those made at the plant price, the Cleveland plant price?

A. Yes, sir.

Q. Wasn't the Cleveland plant price the price for all of Cuyahoga County?

A. It was the price which we used, to which we added the freight and package to make the delivered price.

Q. Well, wasn't that the same price in Cuyahoga County that you were making to private purchasers in Cuyahoga County?

A. We didn't give them the benefit of the base price

at that time, no, the dealers were not—did not have that privilege.

Q. The base price and the plant price were something different, were they—or were they the same?

A. In that instance the base price was the plant price that we sold to the Procurement Division; it is the
33698 lowest price that we had.

Q. And it is the same price that you made to dealers in Cuyahoga County?

A. No, we didn't; we didn't make any dealers that price.

Q. Were the dealers—

A. If we added 29 cents freight rate, and the package, then that was the price that we made to the dealers in that area.

Q. Well, do I understand that as to Detroit and Toledo, you also made bids to the Procurement Division at the regular plant price?

Mr. Smith: If I may interrupt, Flint, you mean?

Mr. Wooden: Yes. Well—

A. Yes—well, now, wait. At Detroit we made them the Detroit price, delivered to Detroit. That's where they wanted it. At Flint it was the same way.

By Mr. Wooden:

Q. Those were regular delivered prices, were they?

A. Those were regular delivered prices; yes, sir.

Q. What about Toledo? I do not believe you mentioned it on direct. Was that involved in any of those transactions?

A. Well, later, there was some bids at Toledo taken by the Procurement Division.

Q. Was that at the Toledo delivered price?

A. That—let us see, now—no, those were at the Toledo delivered price, I am quite sure.

33699 Q. With regard to this flat price throughout lower Michigan which you put in in January, 1937, I understood you to say that that was after you had discussed the matter with Mr. Crapo?

A. Well, I didn't—no, I wouldn't—not just exactly that way. During the preceding year Mr. Crapo and I had discussed the question of a flat price. It was just analyzing the situation to see if a price of that character would be feasible. That discussion had no relationship to my putting the price in in January.

Q. You were agreed that it would be feasible at some time?

A. Well, no, I don't know as we were. We never came to any conclusion as to what—how feasible it might be.

Q. Did he know you were going to put it in before it was actually announced?

A. No, sir.

Q. As I understand it, that flat price for the whole Lower Peninsula was effective only in that area; is that right?

A. That is right.

Q. Why did you stop right at the Michigan State line?

A. That is where our trouble was.

Q. Where?

A. In Michigan.

Q. Well, did the trouble, itself, stop at the Michigan State line?

A. That has been our experience in the past, that 33700 it very often stops at the line.

Q. Why should there be any trouble that stops right at the State line and was corrected by a remedy applied that stopped only at the State line? Why should there be anything like that?

A. I don't know. We may be a peculiar class of people in Michigan, but, nevertheless, that is where we do seem to have a lot of differences of opinion among ourselves in the cement industry, and I am rather inclined to think that that could be shown by the fact that the price of cement in Michigan is lower than it is in any other place in the United States—unfortunately.

Q. As a matter of fact, the so-called Wyandotte basis was not effective beyond the Michigan State line, was it?

A. There have been cases of that character; yes, sir.

Q. Although, if allowed to run and have its full effect, it would control the price beyond the Michigan State line, would it not?

A. Well, there have been times in the past that it would, but of late years that would not be quite possible because of the intervention of other plants.

Q. What do you mean by "late years"?

A. I mean since, for instance, we have had Toledo. That is one of the reasons why.

Q. You said "of late years." What are your "late years"?

33701 A. Well, the late years are from the time of the building of the Toledo plant in 1930, about.

Q. Well, in 1932, some low prices were made in Indiana, were there not, by Aetna supplying the Wyandotte base over there.

A. Yes; I recall the instances; yes, sir.

Q. Would you say that before that time the Wyandotte base had not been applicable outside the State?

A. I recall an instance where it had been carried over into Indiana. I would not want to state positively whether that was before or after those Indiana bids, but I remember one time that the Alpha Company decided that the Wyandotte base should go into Indiana, and they took it down there.

Q. Was that prior to 1932?

A. I cannot say positively. It was along in those years.

Q. And, now, has it been since 1932?

A. We have never, ourselves, run the Wyandotte base and used it as a method of making delivered prices in Indiana.

Q. Or beyond the Sfate line of Michigan? How about that? Have you applied it beyond the State line of Michigan?

A. Well, that would bring it into Indiana.

Q. Only?

A. Well, Ohio touches the State line there for a very short distance.

Q. Did you make any other attempts to solve this difficulty reflected by the Aetna and Wabash marketing

33702 troubles before you put in this flat price?

A. No, sir; I did not act as peace maker.

Q. Was there any similar difficulty between the Aetna and Wabash after you withdrew your flat price in April, 1938?

A. Not that I know of.

Q. When did you become a trustee of The Cement Institute, Mr. Rooney?

A. In June or July, I would say, approximately, 1933.

Q. And how long did you remain as a trustee?

A. Until I failed to run for reelection, in the annual meeting in 1938, I believe.

Q. And the annual meeting was held when?

A. In the fall of 1938.

Q. So you were a trustee between June, 1933, and the fall of 1938; is that right?

A. I think so. The dates have slipped my mind a little bit there, but I think that is approximately true.

Q. As a trustee of the Institute, did you call meetings of the members in your district?

A. I did; yes, sir.

Q. How frequently were such meetings held?

A. Oh, I don't know—not over two or three a year.

Q. At any regular time, or just on call?

A. No, just when there was something to talk about in connection with the N.R.A.'s activity.

33703 Q. Well, you had meetings both before and after the N.R.A.; had you not?

A. Well, not N.R.A. meetings; no, sir.

Q. Did you have meetings of the members in your district?

A. Well, I have attended meetings, yes, where there were members of the cement industry there.

Q. I take it you called meetings during the period you were trustee?

A. During that period; yes, sir.

Q. Did you attend any meeting of the cement manufacturers in Detroit in July, 1936?

A. Well, I do not connect July, 1936, but it is very possible that I did.

Q. That month was the month that Mr. Cree left the Aetna Company. Do you recall attending a meeting there at which Mr. Stone, of Chicago, was present—Mr. Stone, of the Universal-Atlas Company?

A. Yes, sir. I still am not agreeable as to the date—I mean, as to the month. It does not seem to me that that was the month that Mr. Stone was at the meeting that I attended.

Q. Was it shortly before Mr. Cree's separation from the Aetna Company?

A. Well, to my recollection, that meeting at which Mr. Stone was present was more than what you could call a period shortly before Mr. Cree left the company.

33704 Q. How long before?

A. Well, it seems to me as though it were several months before.

Q. Who else were present at the meeting?

A. Mr. Johnson of Boston, and Mr. Cree and Mr. Lingeman, Mr. J. B. John, and Mr. Fred Stone—

Q. Was there anyone there from the Lone Star? How about Mr. Pierson?

A. I don't recall Mr. Pierson at that meeting.

Q. Anyone from the Lone Star?

A. I don't recall anyone there from the Lone Star group.

Q. What was the subject of the meeting?

A. Well, in so far as I was involved at that meeting, there was a luncheon at which these members of the industry had gathered, and I was called to come over to the hotel and have lunch with them. The discussion at the luncheon was the difficulties that were being encountered by the Wabash and Aetna Company. They were at swords-point apparently, and there was not a very friendly relationship existing, and they wondered if there was not anyone that could act as good Samaritans, and see if we could not develop a more friendly relationship between them.

Q. Was that during the time that this base had been put in by Wabash at Aetna's mill?

A. Well, that—I don't recall. It seems to me 33705 that that was one of the things. I am—my recollection is not very clear on it.

Q. Was Mr. Harry Jennings, of Wabash Company, present?

A. No, sir.

Q. Anybody present from Wabash Company at the meeting?

A. Yes—well, at the luncheon, no.

Q. What are you referring to when you said someone was present from the Wabash Company? What meeting are you referring to?

A. I am referring to the meeting that was adjourned to Mr. Stroh's office in the National Bank Building, after the luncheon.

Q. Adjourned? In other words, held immediately after?

A. Well, yes, after luncheon, they walked over to—

Q. Who were present at that adjourned meeting?

A. That same group.

Q. Plus someone from Wabash?

A. Mr. Stroh, Mr. Emil Stroh.

Q. And was anyone else present there from Huron Company, besides yourself?

A. No, sir.

Q. Some other Michigan companies represented?

A. Well, the Aetna—the three men from the Aetna Company.

Q. How about the Peerless and Consolidated companies,

did they have anybody present?

33706 A. No, I don't think so.

Q. Mr. Calvin of the Consolidated Company present?

A. I don't remember. My recollection is that he was not there.

Q. Well, now, let me see. The only one that you can remember being present was yourself and Mr. Stone, and three men from Aetna?

A. Mr. J. B. John.

Q. John, and then—

A. And Mr. Stroh.

Q. Mr. Stroh.

A. Well, that made quite a roomful.

Q. What was Mr. Stone's interest in the situation over in Michigan at that time?

A. I beg your pardon?

Q. What was Mr. Stone's interest in conditions over in Michigan at that time?

A. Well, the Universal Atlas Company shipped into Michigan.

Q. Who was responsible for calling this meeting?

A. Well, I—I—I know who insisted upon my going over, and invited me over, and I am assuming that he might have been the peacemaker.

Q. Who was that?

A. That was Mr. J. B. John. I went back to my office after the luncheon to try and do some work, and

33707 they determined that they would then go over to Mr. Stroh's office, and then they insisted upon me accompanying them, so I went over, after some protest.

Q. What was the outcome of the meeting?

A. Well, it would be a rather difficult thing—I was a very interested bystander. I had nothing to say, nothing to offer; I just watched. I was interested in watching Mr. Stroh's sphinx-like expressions, as they talked to him, and he continued that throughout the time that they were discussing this, and then they all left and shook hands, and what the result was I don't know; it didn't affect me particularly, and I wasn't particularly interested.

Q. Were any of Mr. Cree's alleged methods discussed at that meeting?

A. Well, I don't know as there was anything particular directed at Mr. Cree. It was just a question of things—they discussed things that they—that the Wabash felt aggrieved

that the Aetna Company had done to them in the way of some unethical business practices.

Q. The fact of the matter is that the dispute between those two companies was affecting the prices obtainable by the other companies, isn't that so?

A. No—weren't any prices discussed.

Q. What was the interest of the other companies in the matter?

33708 A. Why, one of them had stolen some business from the other, that he had already under contract.

Q. What was the interest of the other companies between those two?

A. Well, just a natural feeling that they like to—they hate to see good friends fall out, I suppose.

Q. Well, do I understand that the meeting produced some results as indicated by the fact that they all shook hands when it broke up?

A. That's the extent of it, as I ever knew anything about it.

Q. What do you mean? That the meeting was—had no effect in solving any of the difficulties or problems involved?

A. I don't think it did. I never saw any indication of it. I think they were quite satisfied to get around to a point where they would shake hands, that was something.

Q. I understood Mr. Johnson of the Aetna Company was there?

A. Yes, sir.

Q. Did not the Hudson Company continue to file its prices with the Trade Practice Committee that succeeded to the Code Authority?

A. No, sir.

Q. You continued to have some correspondence with the Trade Practice Committee, did you not?

A. I didn't.

Q. Concerning filed prices?

33709 A. No, we didn't file prices.

Q. And conditions of prices, and—

A. Just the minute that the story came out in the newspapers that the Supreme Court had acted in the Schechter case, I issued an order in our office that the filing of prices should be discontinued immediately.

Q. (Showing document to witness.) Showing you Commission's Exhibit 290-E and F, does that refresh your recollection about correspondence with the secretary of

the Institute, and copies being sent to the Trade Practice Committee in August, 1935?

Mr. Smith: What is the number of that, Mr. Wooden?

Mr. Wooden: 290-E and F.

(Witness studies document.)

A. Yes, I think I remember this correspondence.

By Mr. Wooden:

Q. You are still confident that you filed no prices with the Code—

A. Yes, sir.

Q. —with the Trade Practice Committee?

A. Yes, sir.

Q. Did you file any announcements to trucking policy with the Trade Practice Committee after the Code went out?

A. No, sir; we didn't file any.

Q. Didn't you inform the Trade Practice Committee, or the Secretary of the Institute, what your trucking policy was?

33710 A. Well, I do not remember of having acted on them. It is very possible that he could have picked it up in the field, because we announced our policies to the public generally.

Q. I am showing you Commission's Exhibit 417-M, which is a document that was produced under subpoena duces tecum from the files of your company, and it has some reference to the views of competitors on the subject of trucking, I believe.

A. Yes.

Q. I will ask you if you were the author of that document.

Mr. Withrow: 417-M?

Mr. Wooden: Yes.

A. I do not think that I ever dictated that.

By Mr. Wooden:

Q. It came from the files of your company. Can you tell us who is the author?

A. I cannot; no, sir.

Q. Now, I show you Commission's Exhibit 417-GG, for identification, which also is produced from the files of your company under subpoena duces tecum. Can you say whose document that is; who prepared that?

A. That is quite evident to me; that is my writing.

Q. On the bottom, do you mean?

A. Yes.

Q. From "F. R. Johnston"?

A. Yes, sir.

33711 Q. You do not know who prepared it?

A. No; I would not know.

Q. How did you obtain that from Mr. Johnson?

A. It very likely came in the mail.

Q. Well, I might say that myself, but I am asking you how you did obtain it; not how you might have obtained if. Do you have a recollection about that?

A. No.

Q. Did you attend the meeting that is referred to in that document?

A. I attended, to my recollection, a meeting once at the Book-Cadillac Hotel in Detroit, at which Mr. Johnson was present, and I attended another meeting at which Mr. Johnson was present, in the City of Chicago. Now, whichever one of those meetings—

Q. Did you ever attend a meeting in Boston at which Mr. Johnson was present?

A. No, sir.

Q. Do I understand that you cannot tell us whether you were present at this meeting that is referred to here?

A. I rather think I was; yes, sir.

Q. And where was it held?

A. I am quitet sure it was at the Book-Cadillac Hotel in Detroit. I think that is the one that they referred to.

Mr. Wooden: Your Honor, I would like to offer
33712 this Exhibit 417-GG, for identification, although it is a duplicate as to contents of Commission's Exhibit No. 34, but it has this difference, that it contains the witness' writing on the bottom, and the Exhibit 34 contains other writing by Mr. Cree, who also had a copy (handing the document to Mr. Smith).

Mr. Smith: I do not know that there is anything objectionable about it, but the curious thing about it is that the exhibit already in, No. 34, has, as Mr. Wooden says, other writing on the bottom, and the other writing on the bottom is "Meeting in Boston, Johnson, Cronkheit"—

Mr. Wooden: I do not know whether that is "Cronkheit." It does not look like "Cronkheit."

Mr. Smith: Well, it is "Conk," C-o-n-k. We are together that far.

Mr. Wooden: I do not know whether we are or not. There are two "t's."

Mr. Smith: "C-o-n-k."

Mr. Wooden: Or "C-o-m-p." It might be "Competitors"; I do not know.

Mr. Smith: Anyway, the witness said he thought this referred to the meeting in Detroit.

Trial Examiner Norwood: You can ask him some questions on redirect as to that.

Mr. Smith: It seems to me he might have been shown that one first.

33713

33714 (COM. EX. 417-GG, was offered and received in evidence.)

By Mr. Wooden:

Q. Mr. Rooney, showing you Commission's Exhibit No. 20-A which is a letter from Mr. Johnson, of the Aetna Company, to Mr. Lingeman of that company, and calling your attention to the first paragraph, you recall your attendance at the meeting referred to there?

A. What is that date?

(Mr. Wooden indicated on document.)

A. That is the meeting that I referred to in my testimony.

Q. This is a different year. I mean the other is 1935, and this one is 1933.

A. Well, that is the only one that I know of. There was only one meeting that I attended in Mr. Stroh's office.

Q. Oh, the Book-Cadillac Hotel meeting was the one I thought you were talking about in regard to this Exhibit 417-GG. That is the Book-Cadillac Hotel meeting, is it not?

A. That might have referred to a meeting that I recall that was held at the Book-Cadillac Hotel, at which
33715 Mr. Johnson was present, and which I attended, and one in Chicago.

Q. My present question is: Do you recall a meeting that is referred to in the first paragraph of Commission's Exhibit 20-A, which I show you?

A. I recall, and I think I testified, the meeting that was—well, the luncheon that was held in the Book-Cadillac Hotel, after which they adjourned to Mr. Stroh's office. Undoubtedly that is a reference to that. I am not sure of the year. I said at the time I thought it was substantially prior to the time of Mr. Cree's leaving the company.

Q. Well, this is 3 years before.

A. I think that probably that might be so.

Q. Did you not attend a meeting in July, 1936, just on or about the time, or immediately following the time of Mr. Cree's leaving the Aetna Company?

A. I do not recall any such meeting; no, sir.

Q. You recall the gentleman being present that I named in this first paragraph of Commission's Exhibit 20-A?

A. That does not refresh my memory in respect to those gentlemen, no. I do not recall that; I did not recall them before, and that does not help me any.

Q. You remember they were there?

A. I do.

Q. Do you remember Mr. Lucas being there?

A. I do not.

33716 Q. Do you remember a representative from the Marquette Company?

A. I don't remember.

Q. Well, you did not mention a Mr. Lucas or a Marquette representative—

A. Before.

Q. —in connection with the Book-Cadillac Hotel meeting, after which you went to Mr. Stroh's office?

A. That is right. I did not mention them. I still do not recall that they were there.

Q. Do you wish to testify, Mr. Rooney, that Mr. Crapo, while he was alive, the general manager of the company, did not play an active part in determining the policy of the company—the sales policy?

A. Yes; I might imply that. I believe that is true.

Q. That he was not active?

A. Mr. Crapo was very active.

Q. Oh!

A. In watching the activities of the company as a whole. He took a great deal of interest in the company, and he spent a great deal of his time in the office of the company.

Q. Did he not have some interest in and some part in shaping the policy of the company in early 1933, when it went on a delivered-price basis?

A. No, he did not—he made no suggestions at
33717 that time as to what the policy should be.

Q. You did not even talk it over with him beforehand?

A. I don't recall that we did—or that I did, rather.

Q. Were you aware that Mr. Crapo had contacts with competitors?

A. Well, Mr. Crapo—

Q. Regarding the Huron Company policies?

A. Yes; yes, I was aware of that.

Q. He would inform you about those contacts, would he?

A. Yes; he did. They were very infrequent.

Q. Were you not aware that competitors sometimes sought out Mr. Crapo as the party with whom to make their contacts with the Huron Company?

A. Why, it is possible that they did. There are lots of things that Mr. Crapo did, probably, that I would know nothing of.

Q. Well, you did know, didn't you, that competitors made contacts with Mr. Crapo?

A. I know—I have in mind one particular instance, yes.

Q. Well, what was that?

A. One time when Mr. Affleck of the Universal Company called Mr. Crapo on the telephone in connection with a situation that I had handled.

Q. What situation was that?

A. That was the sale of Fort Peck cement.

33718 Q. Do you have any other instances in mind where competitors sought out Mr. Crapo as their point of contact with the Huron Company?

A. The only other instance that I knew of, and Mr. Crapo advised me—I wouldn't say reported to me—but he advised me of the fact that Mr. Affleck had contacted him on the telephone, and he also at one time advised me that Mr. J. B. John had met him and discussed with him some matters in Cleveland.

Q. What were those matters?

A. He told me at the time that there was some discussion on the part of John about the advisability of putting Cleveland on the Buffington base.

Redirect Examination by Mr. Smith.

Q. You said in cross, I think, that the announcement—that the policy which was announced on March 10, 1933, had been in effect on that date. Without too much repetition, there have been exceptions to that, have there not?

A. Many of them.

Q. And they have been described in your testimony and in Mr. Meyers' testimony?

A. Yes.

33720 DEWEY T. MEYERS, was thereupon recalled as a witness for the Respondents, and, having been previously sworn, testified further as follows:

Cross-Examination by Mr. MacIntyre.

Q. Mr. Meyers, on your cross-examination you stated that you had had no contacts or communications or conversations with The Cement Institute, with representatives of competitors, such as Mr. George Cole, the traffic manager of the Medusa Portland Cement Company. Do you recall that?

33721 Q. Do you recall that testimony, Mr. Meyers?

A. Yes, I think I do.

Q. Do you care to explain or add to or supplement in any way your statement that you had not had communications or conversations of that character with some representatives of members of the cement industry other than your own company?

Mr. Smith: Have you got that Meyers' letter here that you referred to?

Mr. MacIntyre: That was 1043-J.

A. If I remember correctly now, I said that we filed no more prices with the Code Authority after the—I don't recall that I said that I had no further contact with any such persons.

By Mr. MacIntyre:

Q. Well, what is your testimony as to the facts on that now, as you recall them?

A. Well, I don't remember now.

Q. You don't remember whether or not you have had communications with representatives of your competitors?

33722 A. I have—you mean about white cement?

Q. No, about marketing of cement, marketing and shipping of cement.

A. No, I don't recall any such communications.

Q. Well, I call your attention to Commission's Exhibits 424-A; B, C, D, E, F, G, H, and I, and ask you if they are communications which you recognize as having passed between you and officials of The Cement Institute, and other representatives of competitors, and—

Mr. Smith: (Interposing.) Well, just a moment. Counsel asked him if he had written competitors, and these are all communications to The Cement Institute.

Mr. MacIntyre: I asked him if he had written representatives of competitors.

Trial Examiner Norwood: Yes.

Mr. MacIntyre: And, of course, officials of Cement Institute represent all of the members of The Cement Institute.

Mr. Smith: Well, I think that is a little beyond the pale.

Trial Examiner Norwood: The witness can answer the question.

Mr. Smith: He can answer now.

Trial Examiner Norwood: If he understands it, and if it is not inclusive enough, why—

33723 Mr. Smith: He can answer it now, but Counsel should ask straight-forward questions, I submit.

Trial Examiner Norwood: I think that is fairly clear. Answer the question.

Do you want it read?

The Witness: If your Honor please, I would like to see what the contents of these are first (referring to documents referred to and handed to the witness by Mr. MacIntyre).

Trial Examiner Norwood: Yes.

Mr. Smith: Your Honor, he has already testified that he wrote the Institute about corrections in their rate book, and what these are, and what Counsel is trying to do is to get an intimation—

A. The information that—

Mr. Smith: Just a moment.

Trial Examiner Norwood: Just a moment.

Mr. Smith: Let me finish.

Trial Examiner Norwood: I think you should let the witness answer the question before we discuss this any further.

Mr. Smith: I am not discussing the witness' answer. I am discussing the injustice of the form of the question of Counsel, and the fact that he did not represent the

33724 record right, and it was intended to deceive the witness.

Mr. MacIntyre: I disagree with Counsel that I intended to deceive the witness. It has not been my purpose to do so.

I ask again that the question be read to the witness.

Trial Examiner Norwood: Read the question.

(Last question read by Reporter.)

Trial Examiner Norwood: Do you object to that as misleading him?

Mr. Smith: Oh, it was the prior questions that were misleading. He asked the witness whether he had ever written to competitors.

Trial Examiner Norwood: Yes.

Mr. Smith: Now, he produces these letters to the Institute intimating, I take it, that he did not—he is confronting him and impeaching his prior testimony.

Trial Examiner Norwood: I do not think so. I do not think it is connected up in a way that would impeach him, unless he ties it up with the previous testimony.

Mr. Smith: If your Honor did not think by that method that he was attempting to infer that the witness had made a misstatement, I am content; but I am satisfied that that is what Counsel was after. If he has failed, I am very glad.

Trial Examiner Norwood: I hardly think so.

33725 Answer the pending question.

A. These communications all seem to be dated in 1934, and in my mind I always had The Cement Institute and Code Authority joined as one, and I believe that I stated that my communications run to price filing, after the expiration of the Code.

By Mr. MacIntyre:

Q. (Interposing.) Well, Mr. Meyers—

A. I did state—

Q. —you recognize those?

Trial Examiner Norwood: Wait a minute. Let him finish his answers.

Mr. MacIntyre: All right.

A. I did state that I had called the attention of The Cement Institute to various rate changes as I found differences, as they came to my attention.

By Mr. MacIntyre:

Q. Well, in answer to the question that I asked you, will you state whether or not you recognize those exhibits that are referred to now (referring witness to Commission's Exhibit 424-A through I).

A. Yes, they—

Q. As communications between you and The Cement Institute?

A. Yes.

Mr. MacIntyre: That is all.

Mr. Smith: That is all.